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No. 82-331

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF NEW MEXICO and HAROLD F. OLSON
Individually and as Director, New Mexico
Department of Game and Fish,
Petitioners,

v.

MESCALERO APACHE TRIBE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 25, 1982
CERTIORARI GRANTED NOVEMBER 15, 1982

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I. United States District Court for the District of New Mexico

July 7, 1977—Complaint for declaratory and injunctive relief and application for preliminary injunction filed in the United States District Court for the District of New Mexico.

August 19, 1977—Hearing on Plaintiff's motion for preliminary injunction.

August 25, 1977—Preliminary injunction issued enjoining State of New Mexico from prosecuting any non-Indians for hunting, possessing, or transporting antelope taken on the Mescalero Reservation so long as individual has both a tribal and a state antelope license and denying motion for preliminary injunction in all other respects.

October 13, 1977—Defendants' answer with affirmative defenses filed.

November 21, 1977—Plaintiff's supplemental complaint for declaratory judgment and injunctive relief filed.

December 16, 1977—Defendants' answer to supplemental complaint filed.

April 21, 1978—Stipulation by parties for purpose of introduction in evidence.

April 25, 1978—Non-jury trial.

August 2, 1978—Issuance of judgment for Plaintiff declaring that hunting and fishing laws and regulations of the State of New Mexico are inapplicable to any person, Indian or non-Indian, hunting and fishing within the exterior boundaries of the Mescalero Apache Reservation and that jurisdiction to regulate hunting and fishing within the Reservation rests with the Mescalero Apache Tribe and the United States to the exclusion of the State of New Mexico and permanently enjoining Defendants from enforcing New Mexico hunting

and fishing laws against any person either on the Reservation or after the person has left the Reservation for acts done on the Reservation.

August 30, 1978—Defendants' notice of appeal filed.

II. United States Court of Appeals for the Tenth Circuit, No. 78-1790

September 29, 1978—Case docketed.

October 11, 1978—Certified record filed.

November 6, 1978—Docket statement filed.

March 30, 1978—Appellants' brief filed.

June 7, 1979—Appellees' answer brief filed.

August 9, 1979—Appellants' reply brief filed.

October 17, 1979—Oral argument.

August 13, 1980—Opinion and judgment issued.

September 4, 1980—Mandate issued.

April 6, 1981—Writ of certiorari issued by United States Supreme Court vacating judgment issued by United States Court of Appeals for Tenth Circuit on August 13, 1980 and remanding for further consideration.

May 12, 1981—Judgment issued on August 13, 1980 vacated and mandate issued on September 4, 1980 recalled by U.S. Court of Appeals for the Tenth Circuit.

June 29, 1981—Supplemental briefs on remand ordered.

August 18, 1981—Supplemental brief in chief filed.

September 8, 1981—Supplemental answer brief filed.

October 15, 1981—Supplemental reply brief filed.

April 26, 1982—Opinion and judgment on remand issued.

May 18, 1982—Mandate on remand issued.

III. Supreme Court of the United States

November 12, 1980—Petition for writ of certiorari filed by State of New Mexico.

December 11, 1980—Brief in opposition to petition for writ of certiorari filed by Mescalero Apache Tribe.

April 6, 1981—Order granting petition for certiorari, vacating decision of United States Court of Appeals for Tenth Circuit dated August 13, 1980, and remanding case to that court for further consideration in light of *Montana v. United States*, 450 U.S. 544 (1981).

August 25, 1982—Petition for writ of certiorari filed by State of New Mexico following judgment on remand issued by United States Court of Appeals for Tenth Circuit.

September 27, 1982—Brief of amici curiae States of Utah, Arizona, California, Montana, Nevada, South Dakota, Washington and Wyoming in support of petition for writ of certiorari.

October 14, 1982—Brief in opposition to petition for writ of certiorari filed by Mescalero Apache Tribe.

November 15, 1982—Order granting petition for writ of certiorari issued.

IN THE

United States District Court

FOR THE DISTRICT OF NEW MEXICO

MESCALERO APACHE TRIBE,
Plaintiff,

vs

STATE OF NEW MEXICO and
WILLIAM S. HUEY,
Individually and as Director of the New Mexico
Department of Game and Fish, or his Successors in Office.
Defendants.

No. CIV 77-395

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (Filed July 7, 1977)

1. This is an action for declaratory and injunctive relief pursuant to 28 U.S.C. 2201 and 2202 in which the Mescalero Apache Tribe (Tribe) seeks a judgment from this court declaring that New Mexico's hunting and fishing laws and regulations are inapplicable to any person, Indian or non-Indian, hunting or fishing within the exterior boundaries of the Tribe's Reservation and that jurisdiction to regulate hunting and fishing within the Mescalero Apache Reservation rests with the Mescalero Apache Tribe and the United States to the exclusion of Defendants. The Tribe also seeks preliminary and permanent injunctive relief enjoining Defendants or their agents from enforcing New Mexico's hunting and fishing laws and regulations against any person either on the Reservation or after they have left the Reservation for acts done on the Reservation.

2. This court has jurisdiction pursuant to 28 U.S.C. 1331 and 1362 as the action is brought by a Tribe having a governing body duly recognized by the Secretary of the Interior; the matter in controversy exceeds the sum of $10,000.00 exclusive of interest and costs and arises under the Constitution, laws and treaties of the United States.

3. The Mescalero Apache Tribe is an Indian Tribe recognized by the Treaty of July 1, 1852, 10 Stat. 979, which places them exclusively under the laws, jurisdiction and government of the United States of America.

4. Article 9 of the Treaty of July 1, 1852 provided that the United States government would designate, settle and adjust the boundaries of the signatories to the Treaty and thereafter the Mescalero Apache Reservation was created by a series of Executive Orders beginning in 1873.

5. The Mescalero Apache Tribe is governed by its Revised Constitution of January 12, 1965, which was adopted pursuant to 25 U.S.C. 476, a section of the Indian Reorganization Act of 1934. The governing body is duly recognized by the Secretary of the Interior as shown by his approval of the Revised Constitution. A copy of this Constitution is attached as Exhibit "A" and is incorporated by reference.

6. Defendant, William S. Huey, is Director of the New Mexico Department of Game and Fish and is the chief state officer responsible for the enforcement of New Mexico's hunting and fishing laws and regulations.

7. Pursuant to Article IX, Section 1(c) of the Tribe's Revised Constitution, the Tribal Council has adopted a hunting and fishing ordinance governing all persons, Indian and non-Indian, hunting and fishing on the Reservation. The Tribal Council has also adopted a resolution specifically for the 1977 hunting and fishing seasons which spells out in detail the rules and regulations governing hunting and fishing on the Reservation for that particular year. Neither Tribal Council enactment requires a state license for hunting or fishing within the Reservation. Copies of these enactments are attached hereto as Exhibits "B" and "C" and incorporated herein by reference.

8. An elk herd numbering 162 elk was released on the Mescalero Apache Reservation in 1966-67. This came about through a joint effort of the Mescalero Apache Tribe and Bureau of Indian Affairs after an elk habitat reconnaissance had been made. The state of New Mexico did not participate in any manner in this endeavor.

9. Eighty-five per cent or more of the elk herd maintain themselves permanently within the exterior boundaries of the Mescalero Apache Reservation. The remaining fifteen per cent occasionally spent short periods of time in the White Mountain Wilderness Area or the Lincoln National Forest. The elk seldom if ever leave tribal or federal land.

10. The antelope population within the Reservation is non-migratory and these animals seldom if ever leave the exterior boundaries of the Mescalero Reservation.

11. The Mescalero Apache Tribe employs seven full-time tribal conservation officers who work in conjunction with the Bureau of Indian Affairs to assure conservation of fish and game within the Reservation.

12. Tribal conservation officers and BIA officers jointly conduct annual aerial surveys of deer and elk population and semi-annual aerial studies of the antelope population. In addition, pellet group transect studies are conducted twice a year to show the trend in deer and elk population. Bear population is estimated on the number of group sightings. As a result of these studies, Tribal and BIA conservation officials make yearly recommendations to the Tribal Council as to appropriate seasons and game limits consistent with conservation of the reservation wildlife.

13. Tribal conservation officers work in close cooperation with the Bureau of Sport Fisheries and Wildlife of the United States Department of the Interior in stocking the waters of the Reservation with fish and the Tribal conservation officers make recommendations on fishing seasons and limits to the Tribal Council to insure conservation. The State of New Mexico does not stock any lakes or streams within the Mescalero Apache Reservation.

14. The state of New Mexico plays no role in the conservation of fish and game within the Mescalero Apache Reservation.

15. Bag limits and hunting and fishing seasons within the exterior boundaries of the Mescalero Reservation do not coincide with those set forth in the state of New Mexico's hunting and fishing regulations.

16. 53-2-31 NMSA provides that New Mexico's hunting and fishing regulations are applicable to " . . . Indians coming into New Mexico from other states and to all persons hunting on any Indian reservation within this state . . . " except that no Indian is required to have a license to hunt or fish within the limits of the reservation where he resides. Other than the exception mentioned, the state of New Mexico purports to require all persons hunting or fishing within the Mescalero Apache Reservation to obtain state hunting and/or fishing licenses.

17. On September 23 through 26, 1977, two non-Indians, James Oliver and Sherman Shaw, each possessing tribal licenses only, participated in an elk hunt on the Reservation and each killed an elk.

18. Messrs. Shaw and Oliver each placed their elk in the care of Assorted Tracks Corporation of America, (Assorted Tracks), a taxidermy and meat processing organization, doing business in Dallas County, Texas. Mescalero tags were attached to the animals, but no state tags.

19. Assorted Tracks took the meat, antlers and capes to Garland, Texas, to have the meat processed, and prepared the remainder for taxidermy work. The cape and hide belonging to Sherman Shaw were picked up by one of Shaw's employees on October 28, 1976.

20. On November 2, 1976, Keith McCartney, Special Agent for the Department of Interior, United States Fish and Wildlife Service, Fort Worth, Texas, entered Assorted Tracks' Garland facility and placed the antlers and cape belonging to James Oliver under seizure notice. Upon information and

belief, this was done at the request of the New Mexico Department of Game and Fish.

21. Criminal charges were brought against both Oliver and Shaw in Magistrate Court in Otero County, New Mexico, and both parties paid a $600.00 fine.

22. New Mexico officials intend to continue to enforce state hunting and fishing regulations against persons hunting and/or fishing with tribal authorization within the exterior boundaries of the Mescalero Apache Reservation.

23. The Mescalero Apache Tribe and its members derive substantial economic benefit from persons hunting and fishing on the Reservation. In 1976 such benefits were in excess of $100,000.00. Some of this income goes to the Tribe and is used for the administration of tribal resource programs and to provide governmental and social services for the members of the Tribe. The remainder goes directly to members of the Tribe for services rendered to hunters.

24. Enforcement of New Mexico's hunting and fishing laws and regulations against persons hunting and fishing within the Reservation threatens to destroy the entire hunting and fishing program of the Tribe to the severe economic detriment of the Tribe and its members, as the general public fears state prosecution for actions fully authorized by the appropriate tribal authorities. State action such as that against Shaw and Oliver destroys the goodwill the Tribe has developed and which is so essential to the Tribe's overall development of tourism on the Reservation.

25. The state of New Mexico publishes literature for use of the general public which states that state hunting and fishing licenses are required for hunting and fishing on Indian reservations within the state and this significantly discourages non-Indians from hunting and fishing on the Mescalero Apache Reservation because they must either buy two sets of licenses or risk arrest upon leaving the Mescalero Apache Reservation. As a result, the Mescalero Apache Tribe loses badly needed tribal revenues required to support its wildlife program and other governmental services.

26. Enforcement of New Mexico's hunting and fishing laws and regulations against persons hunting and fishing on the Mescalero Reservation infringes on the sovereignty and self-government of the Mescalero Apache Tribe and threatens to undermine tribal authority.

27. The new hunting and fishing seasons are fast approaching and unless a preliminary injunction is issued pending final determination in this action, and upon final hearing, a permanent injunction, enjoining Defendants and their agents, servants or others acting in consort with them from enforcing New Mexico game and fish laws and regulations against persons either while on the Reservation or after they have left the Reservation, for activities within the Reservation, and further enjoining them from communicating to the public that state licenses are needed for hunting and fishing within the Mescalero Apache Reservation, the Mescalero Apache Tribe will suffer irreparable injury in excess of $10,000.00 exclusive of interest and costs in that its hunting and fishing program will suffer irretrievable setbacks causing economic loss to the Tribe and its members; the Tribe will suffer irretrievable loss of goodwill upon which its entire tourism program depends and tribal governmental authority will be seriously undermined.

28. The past and threatened acts of Defendants in conflict with:

(a) The Treaty of July 1, 1852 between the United States and the Apache Nation, 10 Stat. 979;

(b) 18 U.S.C. 1165 and the Tribe's Hunting and Fishing Ordinances;

(c) The New Mexico Enabling Act, 36 Stat. 557, and Article XXI, Sec. 2 of the New Mexico Constitution;

(d) Art. 1. Sec. 8. cl. 3 of the United States Constitution;

(e) Federal Common Law limiting state infringement on tribal sovereignty;

(f) Federal policy of Indian self-determination as expressed in the Indian Reorganization Act and other federal laws.

(g) 25 U.S.C. 1321, 1322, 1326 relating to procedures for state assumption of jurisdiction over Indian reservations.

WHEREFORE, Plaintiff prays that this Court issue a declaratory judgment declaring that:

(a) The hunting laws and regulations of the state of New Mexico are not applicable to persons hunting or fishing on the Mescalero Apache Reservation, either while on the Reservation or after they leave the Reservation as to acts performed on the Reservation;

(b) That the regulation of hunting and fishing within the Reservation is in the hands of the federal and tribal governments to the exclusion of the State of New Mexico;

(c) That an attempt to enforce New Mexico hunting and fishing regulations against persons hunting and fishing on the Reservation would violate the Treaty of July 1, 1852 between the United States and the Apache Nation, 10 Stat. 979, 18 U.S.C. 1165 and the Tribe's hunting and fishing ordinance; the New Mexico Enabling Act and Article 21, Section 2 of the New Mexico Constitution; Article 1, Section 8, Clause 3 of the United States Constitution; Federal Common Law limiting state infringment of tribal sovereignty; Federal policy of Indian self-determination as expressed in the Indian Reorganization Act and other federal laws; 25 USC 1321, 1322, and 1326 relating to procedures for state assumption of jurisdiction over Indian reservations;

(d) Defendants should be preliminarily and permanently enjoined from attempting to enforce New Mexico's hunting and fishing laws against persons hunting and fishing on the Reservation or after they leave the Reservation for acts done on the Reservation and they should further be enjoined from in any way communicating to the public that state hunting and fishing licenses are needed within the Mescalero Apache Reservation.

FETTINGER AND BLOOM

By /s/ GEORGE E. FETTINGER
George E. Fettinger

/s/ NORMAN D. BLOOM, JR.
Norman D. Bloom, Jr.

/s/ KIM J. GOTTSCHALK
Kim J. Gottschalk

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Post Office Drawer M
Alamogordo, New Mexico 88310

(Subscription Omitted in Printing)

IN THE

United States District Court

FOR THE DISTRICT OF NEW MEXICO

(Caption Omitted In Printing)

APPLICATION FOR PRELIMINARY INJUNCTION AND REQUEST FOR EVIDENTIARY HEARING (filed July, 1977)

The Mescalero Apache Tribe requests this Court to issue a Preliminary Injunction enjoining the State of New Mexico and William S. Huey, Director of the New Mexico Department of Fish and Game as follows:

1. From attempting to enforce New Mexico's hunting and fishing laws and regulations against persons hunting and fishing on the Mescalero Reservation;

2. From enforcing said laws or regulations against persons after they leave the Reservation for acts performed on the Reservation;

3. From communicating to the public in any way that state licenses are required for hunting or fishing within the Mescalero Apache Reservation.

The grounds of this application are as follows:

1. The State of New Mexico recently prosecuted two non-Indians for hunting within the exterior boundaries of the Mescalero Apache Reservation without a state license even though they had Tribal authority to hunt. The state also caused a federal agent to confiscate the trophies taken by the hunters.

2. Literature put out by the New Mexico Department of Game and Fish represents to the public that state hunting and fishing licenses are necessary for hunting and fishing within the Mescalero Apache Reservation.

3. If allowed to continue, this action by the State of New Mexico will cause irreparable direct and indirect economic harm to the Mescalero Apache Tribe through loss of revenue from the sale of licenses and guide services as well as loss of revenue at the Inn of the Mountain Gods. Such action will also cause the Tribe to lose goodwill and thereby suffer irreparable injury to its tourism program. The Tribe will also suffer continued infringement of its tribal sovereignty.

The Tribe has not had contact with Defendants or their attorneys, but presumes they would object to this application and requests a hearing to be held thereon.

The Tribe requests an evidentiary hearing with oral argument on this application.

FETTINGER AND BLOOM

By /s/ NORMAN D. BLOOM, JR.

Post Office Drawer M
Alamogordo, New Mexico 88310

Attorneys for Mescalero Apache Tribe

IN THE

United States District Court

FOR THE DISTRICT OF NEW MEXICO

(Caption Omitted In Printing)

PRELIMINARY INJUNCTION

(filed August 25, 1977)

This case came on to consider plaintiff's application for a preliminary injunction.

This is an action for declaratory and injunctive relief; the question to be resolved is whether the Mescalero Apache Tribe has sole authority to regulate hunting and fishing by Indians and non-Indians within the exterior boundaries of the reservation. The State contends that it has the power to regulate hunting and fishing by non-Indians and to require state licenses to hunt on reservation lands. The State recognizes the right of the Tribe to co-regulate hunting on the reservation by requiring a Tribal license and imposing other conditions on the entry of its land. The State's theory of its power to regulate hunting is the system which has been in effect since 1972 to the present.

The Mescalero Tribal Council has set harvest limits and authorizes the sale of permits. In the past years the Tribe has sold nearly all permits authorized producing substantial revenue for the Tribe. It appears that the Tribe's change of position that no New Mexico license is required, coupled with notice that it will not be responsible for any consequences suffered by a hunter who fails to obtain a State license, has not deterred hunters from buying Mescalero permits for the coming season.

There is, however, one area of direct conflict. The Tribe has set August 29 to September 2 as its first antelope season and

has authorized ten permits. The State's season begins September 1. Formerly other hunt dates have coincided as a result of State and Tribal cooperation. This year, however, any non-Indian desiring to hunt antelope on the reservation cannot do so without violating the New Mexico Game laws. The Tribe's difference in selection of dates is based on the availability of personnel for hunting and non-hunting duties.

Except for the antelope hunt, the evidence fails to show any indication of irreparable harm to warrant an injunction. Further, the injunction sought by the Tribe is not one to preserve the status quo, but to change it prior to hearing the action on the merits.

An injunction is hereby entered enjoining the State of New Mexico from prosecuting any non-Mescalero for hunting, possessing or transporting antelope taken on the Mescalero Reservation so long as the individual has obtained both a tribal permit for the Mescalero season and a State antelope license for the applicable season set forth in the state hunting proclamation. This injunction will be vacated if the State Game Commission amends its antelope season to coincide with the Tribe's season, adequately notifies hunters of the change and makes permits available.

IT IS FURTHER ORDERED in all other respects the motion for a preliminary injunction is denied.

/s/

UNITED STATES DISTRICT JUDGE

IN THE

United States District Court

FOR THE DISTRICT OF NEW MEXICO

(Caption Omitted In Printing)

ANSWER

Comes now Defendants, State of New Mexico and William S. Huey, by and through counsel, and as their Answer to the Complaint filed in this cause state that.

FIRST DEFENSE

1. Defendants admit the allegations contained in Paragraph 1 of the Complaint, but Defendants deny the propriety of the relief sought by the Plaintiff.

2. Defendants deny the allegations contained in Paragraphs 2, 3 and 4 of the Complaint.

3. Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 5 of the Complaint and therefore Defendants deny such allegations.

4. Defendants admit the allegations contained in Paragraph 6 of the Complaint.

5. Defendants deny the allegations contained in Paragraph 7 of the Complaint.

6. Defendants admit that approximately 162 elk were released on the Mescalero Apache Reservation in 1966-67, but Defendants deny all other allegations contained in Paragraph 8 of the Complaint.

7. Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 9 of the Complaint and therefore Defendants deny such allegations.

8. Defendants admit the allegations contained in Paragraph 10 of the Complaint.

9. Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 11 of the Complaint and therefore Defendants deny such allegations.

10. Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 12 of the Complaint and therefore Defendants deny such allegations.

11. Defendants admit that the Bureau of Sport Fisheries and Wildlife of the United States Department of the Interior stock some of the waters on the Mescalero Reservation with fish, but Defendants deny all other allegations contained in Paragraph 13 of the Complaint.

12. Defendants deny the allegations contained in Paragraph 14 of the Complaint.

13. Defendants admit the possibility that some New Mexico fishing bag limits may not coincide with those set forth in Mescalero Apache Tribe Ordinance No. 77-2, but Defendants deny all other allegations contained in Paragraph 15 of the Complaint.

14. Defendants admit the allegations contained in Paragraph 16 of the Complaint.

15. Defendants admit the allegations contained in Paragraph 17 of the Complaint with the exception that the figure 1977 should be 1976.

16. Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraphs 18, 19 and 20 of the Complaint and therefore Defendants deny such allegations.

17. Defendants admit the allegations contained in Paragraphs 21 and 22 of the Complaint.

18. Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 23 of the Complaint and therefore Defendants deny such allegations.

19. Defendants deny the allegations contained in Paragraph 24 of the Complaint.

20. Defendants admit that they publish hunting and fishing literature for the benefit of the public, but Defendants deny all other allegations contained in Paragraph 25 of the Complaint.

21. Defendants deny the allegations contained in Paragraph 26 of the Complaint.

22. Defendants deny the allegations contained in Paragraph 27 of the Complaint.

23. Defendants deny the allegations contained in Paragraph 28 of the Complaint.

SECOND DEFENSE

The Complaint fails to establish a justiciable case or controversy between the Plaintiff and the Defendants.

THIRD DEFENSE

The Plaintiff lacks standing to maintain this action against the Defendants.

FOURTH DEFENSE

The United States is an indispensible party to this action.

FIFTH DEFENSE

The Secretary of the Interior of the United States and his designated representatives as guardian of the Plaintiff are indispensible parties to this action.

SIXTH DEFENSE

The claims asserted in this action are barred by laches.

SEVENTH DEFENSE

This Court lacks jurisdiction over the subject matter of this action.

EIGHTH DEFENSE

This Court should abstain from considering the claims asserted in this action.

NINTH DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

WHEREFORE, the Defendants pray that the Court deny the relief requested, dismiss the Complaint, and grant such other and further relief as the Court may deem proper.

/s/ TONEY ANAYA

Toney Anaya
Attorney General

/s/ THOMAS L. DUNIGAN

Thomas L. Dunigan
Deputy Attorney General

/s/ ALBERT L. PITTS

Albert L. Pitts
Assistant Attorney General

IN THE

United States District Court

FOR THE DISTRICT OF NEW MEXICO

(Caption Omitted In Printing)

SUPPLEMENTAL COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

COMES NOW the Plaintiff, by and through its attorneys, the law firm of Fettinger and Bloom of Alamogordo, New Mexico, and as its supplemental complaint pursuant to 15(d) Federal Rules of Civil Procedure, additionally adds to its complaint and states as follows:

1. After the filing of Plaintiff's complaint and after the court order of August 25, 1977, two non-Indians, Jeff Crumley and Gene Moretz, participated in an elk hunt on the Mescalero Apache Reservation during the dates of September 30 through October 5, 1977.

2. Jeff Crumley possessed a tribal bear and elk hunting license and a New Mexico bear and elk hunting license number 116 and Mr. Crumley killed an elk. Mr. Gene Moretz possessed a tribal bear and elk hunting license, but did not possess a New Mexico bear and elk hunting license and did not kill an elk or a bear.

3. Messrs. Crumley and Moretz, upon leaving the Mescalero Apache Reservation, were stopped twice by New Mexico Game and Fish Officers; once at Ruidoso, New Mexico, and again at Roswell, New Mexico.

4. When stopped at Roswell, New Mexico, Ron Porter, Wildlife Enforcement Specialist for the State of New Mexico, informed Messrs. Crumley and Moretz that unless they gave

him a recorded statement they would be issued citations carrying a $1,000.00 fine.

5. Messrs. Crumley and Moretz were detained and taken before a tape recorder and questioned in regard to their hunting on the Mescalero Apache Reservation.

6. Upon seeking New Mexico bear and elk hunting licenses at the Gibson Store, Ruidoso, New Mexico, prior to hunting on the Mescalero Apache Reservation, the vendor or salesman told Messrs. Crumley and Moretz not to purchase New Mexico state licenses until after the kill was made.

7. The state action of deliberate misrepresentation and harassment such as that against Messrs. Crumley and Moretz was done to purposely harass and embarass Plaintiff and to destroy the goodwill the Tribe has developed that is so essential to the Tribe's overall development of tourism on the Reservation.

8. On October 6, 1977, two employees of the Mescalero Apache Tribe John F. Frye, and Reese Tatum, while operating a Ryder Rental Truck, were carrying packaged and frozen elk meat from the Mescalero Apache Reservation to El Paso, Texas, to air express the meat to the various persons who had taken elk on the Mescalero Apache Reservation.

9. Approximately 15 miles south of Alamogordo, New Mexico, the truck being driven by Reese Tatum accompanied by John F. Frye, was stopped for excessive speed by a New Mexico State police officer.

10. Frye and Tatum were asked if they were carrying elk meat, and answered yes; the police officer asked to look into the closed trunk and permission was granted.

11. Upon seeing the packages, the officer searched the person of both Frye and Tatum; took Frye into custody and ordered Tatum to drive the vehicle back to Alamogordo, New Mexico.

12. Upon arrival in Alamogordo, New Mexico, Officer Tim Barraclough of the New Mexico Fish and Game Department started to search the vehicle when consent to search was

withdrawn by the attorney for the Plaintiff, when Officer Barraclough would not disclose the reasons for this entire episode.

13. Traffic citation for speeding in New Mexico is not an offence that requires arrest when the violator agrees to appear before a magistrate or alternatively agrees to mail in a specified fine for the offense.

14. No traffic citation was issued to the driver, Tatum, until two hours after his arrival back at Alamogordo, New Mexico.

15. At no time during the arrest, detention and return to Alomogordo, New Mexico, were either Frye or Tatum informed what was being sought by the New Mexico State Police or the New Mexico Game and Fish Department or for what they were being detained and returned to Alamogordo, New Mexico, until after consent to search the vehicle had been withdrawn by Plaintiff's attorney.

16. The unlawful arrest, detention and attempted search of tribal employees and of the vehicle were all conducted at the behest of the New Mexico Fish and Game Department without probable cause that a crime had been committed or upon which to obtain a search warrant, all in violation of the United States Constitution and the Constitution of the State of New Mexico prohibiting unreasonable arrest and unreasonable search and seizure.

17. This was but another attempt on the part of the New Mexico Fish and Game Department to deliberately harass, embarass and destroy the Plaintiff's development of tourism on the Mescalero Apache Reservation.

WHEREFORE, Plaintiff prays this Court to additionally permanently enjoin the Defendant against any further harassment of Plaintiff, Plaintiff's employees and Plaintiff's guests in the attempt to enforce the state game laws and regulations of the State of New Mexico against Plaintiff.

FETTINGER AND BLOOM

By /s/ NORMAN D. BLOOM, JR.

Norman D. Bloom, Jr.
Post Office Drawer M
Alamogordo, New Mexico 88310

Attorneys for Plaintiff

IN THE

United States District Court

DISTRICT OF NEW MEXICO

(Caption Omitted in Printing)

ANSWER TO SUPPLEMENTAL COMPLAINT
(Filed December 16, 1977)

COMES NOW Defendants, State of New Mexico and William S. Huey, by and through counsel, and as their Answer to the Supplemental Complaint pursuant to Rule 15(d), Federal Rules of Civil Procedure, filed in this cause further state that:

FIRST DEFENSE

1. Defendants admit that two non-Indians, Jeff Crumley and Gene Moretz, participated in an elk hunt on the Mescalero Apache Reservation, but Defendants lack sufficient information to form a belief as to the truth of the other allegations contained in Paragraph 1 of the Supplemental Complaint and therefore Defendants deny such allegations.

2. Defendants admit that Jeff Crumley possessed a New Mexico elk hunting license number 116 and killed an elk, but lack sufficient information to form a belief as to the truth of all other allegations contained in Paragraph 2 of the Supplemental Complaint and therefore Defendants deny such allegations.

3. Defendants deny the allegations contained in Paragraphs 3, 4, 5, 6 and 7 of the Supplemental Complaint.

4. Defendants admit that on October 6, 1977 John F. Frye and Reese Tatum were transporting packaged and frozen elk meat from the Mescalero Apache Reservation in a Ryder Rental Truck, but Defendants lack sufficient information to form a belief as to the truth of all other allegations in

Paragraph 8 of the Supplemental Complaint and therefore Defendants deny such allegations.

5. Defendants admit the allegations contained in Paragraphs 9 and 10 of the supplemental Complaint.

6. Defendants deny the allegations contained in Paragraphs 11 and 12 of the Supplemental Complaint.

7. Defendants admit the allegations contained in Paragraph 13 of the Supplemental Complaint.

8. Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraphs 14 and 15 of the Supplemental Complaint and therefore Defendants deny such allegations.

9. Defendants deny the allegations contained in Paragraphs 16 and 17 of the Supplemental Complaint.

SECOND DEFENSE

The Supplemental Complaint fails to establish a justiciable case or controversy between the Plaintiff and the Defendants.

THIRD DEFENSE

The Plaintiff lacks standing to maintain this action against the Defendants.

FOURTH DEFENSE

The United States is an indispensible party to this action.

FIFTH DEFENSE

The Secretary of the Interior of the United States and his designated representatives as guardian of the Plaintiff are indispensible parties to this action.

SIXTH DEFENSE

The Courts lacks jurisdiction over the subject matter of this action.

SEVENTH DEFENSE

The Supplemental Complaint fails to state a claim upon which relief can be granted.

WHEREFORE, the Defendants pray that the Court deny the relief requested, dismiss the Complaint and grant such other and further relief as the Court may deem proper.

/s/ TONEY ANAYA LTD.

Toney Anaya
Attorney General

/s/ THOMAS L. DUNIGAN

Deputy Attorney General

/s/ ALBERT L. PITTS

Albert L. Pitts
Assistant Attorney General

Bataan Memorial Building
P.O. Drawer 1508
Santa Fe, N.M. 87503

IN THE

United States District Court

FOR THE DISTRICT OF NEW MEXICO

(Caption Omitted in Printing)

DEFENDANTS' REPLY TO PLAINTIFF'S REQUEST FOR ADMISSIONS

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, the Defendants, by and through their attorneys, Thomas L. Dunigan, Deputy Attorney General, and Albert L. Pitts, Assistant Attorney General, reply to Plaintiff's Requests for Admissions, for purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at trial, as follows:

REQUESTED ADMISSION NO. 6. Eight-five percent or more of the elk herd maintain themselves permanently within the exterior boundaries of Mescalero Apache Reservation. The remaining fifteen percent occasionally spend short periods of time in the White Mountain Wilderness Area or the Lincoln National Forest. The elk seldom leave tribal or federal land.

ANSWER: The Defendants cannot truthfully admit or deny the statements made in Request for Admission No. 6 because the Plaintiff has failed to document such allegations and the Defendants have no independent means of ascertaining the truth of the statements contained in Request for Admission No. 6.

REQUESTED ADMISSION NO. 7. The Mescalero Apache Tribe employs seven full-time tribal conservation officers who work in conjunction with the Bureau of Indian Affairs to assure conservation of fish and game within the Reservation. BIA assists the Mescalero Apache Tribe in game management and in addition to Butch Blazer, a full-

time range conservationist, the BIA can call on specialized professionals when needed.

The Reservation is patrolled on a twenty-four hour basis.

ANSWER: The Defendants admit that the Mescalero Apache Tribe employs seven full-time tribal conservation officers who assist Butch Blazer, a BIA range conservationist, with certain game management functions, and that the BIA is able on occasion to provide additional technical assistance. The Defendants further admit that certain districts of the Reservation are patrolled on a twenty-four hour basis during certain periods. All other matters contained in Request For Admission No 7 are specifically denied.

REQUESTED ADMISSION NO. 8. Tribal conservation officers and BIA officers jointly conduct annual aerial surveys of deer and elk population and semi-annual aerial studies of the antelope population. In addition, pellet group transect studies are conducted twice a year to show the trend in deer and elk population. Bear population is estimated on the number of group sightings. As a result of these studies, Tribal and BIA conservation officials make yearly recommendations to the Tribal Council as to appropriate seasons and game limits consistent with conservation of the Reservation wildlife. The Tribe bases the number of permits that it issues on study of resources available, not on the Tribe's need for revenue.

ANSWER: The Defendants admit that tribal conservation officers assist Butch Blazer, a BIA range conservationist, in making aerial surveys of deer, elk and antelope population on the Reservation and that pellet group transect studies are also conducted on the Reservation to show the trend in deer and elk population. The Defendants further admit that Butch Blazer and tribal conservation officers make yearly recommendations to the Tribal Council as to bag limits for deer, elk and antelope. The Defendants specifically deny all other statements contained in Request for Adminission No. 8.

REQUESTED ADMISSION NO. 9. Tribal conservation officers are trained through the National Park training course and/or the BIA police academy at Brigham City, Utah.

ANSWER: The Defendants admit only that three of the tribal conservation officers have attended the National Park training course. The Defendants specifically deny all other statements contained in Request for Admission No. 9.

REQUESTED ADMISSION NO. 10. The conservation officers perform enforcement functions to protect game and management functions such as game studies, transects, pellet count groups, and aerial surveys in order to advise the Tribal Council as to appropriate bag limits and seasons.

ANSWER: The Defendants admit the truth of the matters set forth in Requested Admission No. 10.

REQUESTED ADMISSION NO. 11. The external boundary of the Mescalero Reservation is clearly marked by fences.

ANSWER: The Defendants admit that only a part of the exterior boundary of the Mescalero Reservation is marked by fences. The Defendants deny all other matters set forth in Requested Admission No. 11.

REQUESTED ADMISSION NO. 27. No Dingle-Johnson funds have been spent within the Mescalero Apache Reservation within the last six to eight years.

ANSWER: The Defendants admit the truth of the statements made in Request for Admission No. 27.

REQUESTED ADMISSION NO. 28. The only Dingle-Johnson funds which have arguable (sic) indirectly benefited the Mescalero Apache Tribe in the last six to eight years are those used to publish the state's annual fishing proclamation which contains information concerning fishing on the Reservation.

ANSWER: The Defendants deny the truth of the statements made in Request for Admission No. 28.

REQUESTED ADMISSION NO. 29. New Mexico has not stocked any lakes within the Mescalero Reservation within the last ten years.

ANSWER: The Defendants admit the truth of the statements made in Request for Admission No. 29.

Plaintiff's Exhibit No. 24

TREATY OF 1852, 10 STAT 979

TREATY WITH THE APACHES. JULY 1, 1852.

FRANKLIN PIERCE,

PRESIDENT OF THE UNITED STATES OF AMERICA:

July 1, 1852.

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

Preamble.

WHEREAS a Treaty was made and concluded at Santa Fé, New Mexico, on the first day of July, in the year of our Lord one thousand eight hundred and fifty-two, by and between Col. E. V. Sumner, U. S. A., commanding the 9th Department, and in charge of the Executive Office of New Mexico, and John Greiner, Indian Agent in and for the Territory of New Mexico, and acting Superintendent of Indian Affairs of said Territory, representing the United States, and Cuentas Azules, Blancito, Negrito, Captain Simon, Captain Vuelta, and Mangus Colorado, chiefs, acting on the part of the Apache nation of Indians, situate and living within the limits of the United States, which treaty is in the words following, to wit:

ARTICLE of a Treaty made and entered into at Santa Fé, New Mexico, on the first day of July in the year of our Lord one thousand eight hundred and fifty-two, by and between Col. E. V. Sumner, U. S. A., commanding the 9 Department and in charge of the Executive Office of New Mexico, and John Greiner, Indian Agent in and for the Territory of New Mexico, and acting Superintendent of Indian Affairs of said Territory, representing the United States, and

Cuentas Azules, Blancito, Negrito, Capitan Simon, Capitan Vuelta, and Mangus Colorado, chiefs, acting on the part of the Apache Nation of Indians, situate and living within the limits of the United States.

Authority of United States acknowledged.

ARTICLE 1. Said nation or tribe of Indians through their authorized Chiefs aforesaid do hereby acknowledge and declare that they are lawfully and exclusively under the laws, jurisdiction, and government of the United States of America, and to its power and authority they do hereby submit.

Peace to exist.

ARTICLE 2. From and after the signing of this Treaty hostilities between the contracting parties shall forever cease, and perpetual peace and amity shall forever exist between said Indians and the government and people of the United States; the said nation, or tribe of Indians, hereby binding themselves most solemnly never to associate with or give countenance or aid to any tribe or band of Indians, or other persons or powers, who may be at any time at war or enmity with the government or people of said United States.

The Apaches not to assist other tribes in hostilities.

Good treatment of citizens of the United States by nations at peace with them.

ARTICLE 3. Said nation, or tribe of Indians, do hereby bind themselves for all future time to treat honestly and humanely all citizens of the United States, with whom they may have intercourse, as well as all persons and powers, at peace with the said United States, who may be lawfully among them, or with whom they may have any lawful intercourse.

Cases of aggression on them to be referred to government. Laws to be conformed to.

ARTICLE 4. All said nation, or tribe of Indians, hereby bind themselves to refer all cases of aggression against themselves or their property and territory, to the government of the United States for adjustment, and to conform in all things to the laws, rules, and regulations of said government in regard to the Indian tribes.

Provisions against incursions into Mexico.

ARTICLE 5. Said nation, or tribe of Indians, do hereby bind themselves for all future time to desist and refrain from making any "incursions within the Territory of Mexico" of a hostile or predatory character; and that they will for the future refrain from taking and conveying into captivity any of the people or citizens of Mexico, or the animals or property of the people or government of Mexico; and that they will, as soon as possible after the signing of this treaty, surrender to their agent all captives now in their possession.

Persons injuring the Apaches to be tried and punished.

ARTICLE 6. Should any citizen of the United States, or other person or persons subject to the laws of the United States, murder, rob, or otherwise maltreat any Apache Indian or Indians, he or they shall be arrested and tried, and upon conviction, shall be subject to all the penalties provided by law for the protection of the persons and property of the people of the said States.

Free passage over the Apache territory.

ARTICLE 7. The people of the United States of America shall have free and safe passage through the territory of the aforesaid Indians, under such rules and regulations as may be adopted by authority of the said States.

Military posts, agencies, and trading houses to be established.

ARTICLE 8. In order to preserve tranquility and to afford protection to all the people and interests of the contracting parties, the government of the United States of America will establish such military posts and agencies, and authorize such trading houses at such times and places as the said government may designate.

Territorial boundaries to be adjusted.

ARTICLE 9. Relying confidently upon the justice and the liberality of the aforesaid government, and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Apache's that the government of the

United States shall at its earliest convenience designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.

ARTICLE 10. For and in consideration of the faithful performance of all the stipulations herein contained, by the said Apache's Indians, the government of the United States will grant to said Indians such donations, presents, and implements, and adopt such other liberal and humane measures as said government may deem meet and proper. Presents to the Apaches.

ARTICLE 11. This Treaty shall be binding upon the contracting parties from and after the signing of the same, subject only to such modifications and amendments as may be adopted by the government of the United States; and, finally, this treaty is to receive a liberal construction, at all times and in all places, to the end that the said Apache Indians shall not be held responsible for the conduct of others, and that the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians. When treaty to be binding. How construed.

In faith whereof we the undersigned have signed this Treaty, and affixed thereunto our seals, at the City of Santa Fé, this the first day of July in the year of our Lord one thousand eight hundred and fifty-two.

WITNESSES:

F. A. CUNNINGHAM, *Paymaster, U. S. A.*	E. V. SUMNER. *Brt. Col. U. S. A. comdg 9th Dept. In charge of Executive Office of New Mexico.*	[SEAL]
J. C. McFERRAN, *1st Lt. 8d Inf. Ast. Adj. Gen.*	JOHN GREINER, *Act. Supt. Indian Affairs. New Mexico.*	[SEAL]
CALEB SHERMAN.	CAPITAN VUELTA, his x mark	[SEAL]
FRED. SAYNTON.	CUENTAS AZULES, his x mark	[SEAL]
CHAS, McDOUGALL, *Surgeon, U. S. A.*	BLANCITO ——, his x mark	[SEAL]
S. M. BAIRD, *Witness to the signing of Mangus Colorado.*	NEGRITO ——, his x mark	[SEAL]
JOHN POPE, *Bvt. Cnpt. T. E.*	CAPITAN SIMON, his x mark	[SEAL]
	MANGUS COLORADO, his x mark	[SEAL]

AND WHEREAS, the said Treaty having been submitted to the Senate of the United States, for its constitutional action thereon, the Senate did, on the twenty-third day of March, one thousand eight hundred and fifty-three, advise and consent to the ratification of its articles, by a resolution in the words and figures following, to wit:

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,
March 23d, 1853.

Resolved, (two thirds of the Senators present concurring,) That the Senate advise and consent to the ratification of the Articles of a Treaty made and entered into at Santa Fé, New Mexico, on the first day of July, in the year of our Lord, 1852, by and between Colonel E. V. Sumner, United States Army, commanding the 9th Department, and in charge of the Executive Office of New Mexico, and John Greiner, Indian Agent in and for the Territory of New Mexico, and acting Superintendent of Indian Affairs of said Territory, representing the United States, and Cuentas Azules, Blancito, Negrito, Capitan Simon, Capitan Vuelta, and Mangus Colorado, chiefs, acting on the part of the Apache nation of Indians, situate and living within the limits of the United States.

Attest— ASBURY DICKINS, *Secretary.*

Now, therefore, be it known, that I, FRANKLIN PIERCE, President of the United States of America, do in pursuance of the advice and consent of the Senate, as expressed in their resolution of the twenty-third day of March, one thousand eight hundred and fifty-three, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be herewith affixed, having signed the same with my hand.

Done at the city of Washington, this twenty-fifth day of March, in the year of our Lord one thousand eight hundred and fifty-three, and of the Independence of the United States the Seventy-seventh.

[L. S.]

FRANKLIN PIERCE.

BY THE PRESIDENT:

W. L. MARCY, *Secretary of State.*

Plaintiff's Exhibit 25

EXECUTIVE ORDERS RELATING TO MESCALERO APACHE RESERVATION

Executive Orders

Relating to

Indian Reservations

From May 14, 1855
to July 1, 1912

FORT STANTON OR MESCALERO APACHE RESERVATION.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,

May 23, 1873.

The above diagram is intended to show a proposed reservation for the Mescalero Band of Apache Indians in New Mexico; said proposed reservation is indicated on the diagram by the red lines bordered with yellow, and is described as follows, viz:

Commencing at the southwest corner of the Fort Stanton reduced military reservation, and running thence due south to a point on the hills near the north bank of the Rio Rindoso; thence along said hills to a point above the settlements; thence across said river to a point on the opposite hills, and thence to the same line upon which we start from Fort Stanton; and thence due south to the thirty-third degree north latitude; thence to the top of the Sacramento Mountains, and along the top of said mountains to the top of the White Mountains; thence along the top of said mountains to the headwaters of the Rio Nogal to a point opposite the starting point, and thence to the starting point.

I respectfully recommend that the President be requested to order that the land comprised within the above-described limits be withheld from entry and settlement as public lands, and that the same be set apart as an Indian reservation, as indicated in my report to the department of this date.

EDW. P. SMITH, *Commissioner.*

DEPARTMENT OF THE INTERIOR,
May 26, 1873.

Respectfully presented to the President, with the recommendation that he make the order above proposed by the Commissioner of Indian Affairs.

C. DELANO, *Secretary.*

EXECUTIVE MANSION, *May 29, 1873.*

It is hereby ordered that the tract of country above described be withheld from entry and settlement as public lands, and that the same be set apart as a reservation for the Mescalero Apache Indians, as recommended by the Secretary of the Interior and Commissioner of Indian Affairs.

U. S. GRANT.

EXECUTIVE MANSION, *February 2, 1874.*

In lieu of an Executive order dated the 29th of May last, setting apart certain lands in Mew Mexico as a reservation for the Mescalero Apaches, which order is hereby canceled, it is hereby ordered that there be withdrawn from sale or other disposition, and set apart for the use of said Mescalero Apaches and such other Indians as the department may see fit to locate thereon, the tract of country in New Mexico (except so much thereof as is embraced in the Fort Stanton reduced military reservation) bounded as follows, viz:

Beginning at the most northerly point of the Fort Stanton reduced military reservation; thence due west to the summit of the Sierra Blanca Mountains; thence due south to the thirty-third degree north latitude; thence due east to a point due south of the most easterly point of the said Fort Stanton reduced military reservation; thence due north to the southern boundary of township 11; thence due west to the southwest corner of township 11, in range 13; thence due north to the second correction line south; thence due east along said line to a point opposite the line running north from the thirty-third degree north latitude; thence due north to the most easterly point of said Fort Stanton reduced military reservation; thence along the eastern boundary of said military reservation to the place of beginning.

U. S. GRANT.

EXECUTIVE MANSION, *October 20, 1875.*

In lieu of Executive order dated February 2, 1874, setting apart certain lands in New Mexico as a reservation for the Mescalero Apaches, which order is hereby canceled, it is hereby ordered that there be withdrawn from sale or other disposition, and set apart for the use of said Mescalero Apaches, and such other Indians as the department may see fit to locate thereon, the tract of country in New Mexico (except so much thereof as is embraced in the Fort Stanton reduced military reservation) bounded as follows:

Beginning at the most northerly point of the Fort Stanton reduced military reservation; running thence due west to a point due north of the northeast corner of township 14 south, range 10 east; thence due south along the eastern boundary of said township to the thirty-third degree north latitude; thence due east on said parallel to a point due south of the most easterly point of the said Fort Stanton reduced military reservation; thence due north to the southern boundary of township 11; in range 13; thence due north to the second correction line south; thence due east along said line to a point opposite the line running north from the thirty-third degree north latitude; thence due north to the most easterly point of said Fort Stanton reduced military reservation; thence along the northeastern boundary of said military reservation to the place of beginning.

U. S. GRANT.

EXECUTIVE MANSION, *May 19, 1882.*

In lieu of Executive order dated October 20, 1875, setting apart certain lands in New Mexico as a reservation for the Mescalero Apaches, which order is hereby canceled, it is hereby ordered that there be withdrawn from sale or other disposition, and set apart for the use of the said Mescalero Apaches and such other Indians as the department may see fit to locate thereon, the tract of country in New Mexico bounded as follows:

Beginning at the northeast corner of township 12 south, range 16 east of the principal meridian in New Mexico; thence west along the north boundary of township 12 south, ranges 16, 15, 14, and 13

Beginning at the northeast corner of township 12 south, range 16 east of the principal meridian in New Mexico; thence west along the north boundary of township 12 south, ranges 16, 15, 14, and 13 east, to the southeast corner of township 11 south, range 12 east; thence north along the east boundary of said township to the second correction line south; thence west along said correction line to the northwest corner of township 11 south, range 11 east; thence south along the range line between ranges 10 and 11 east to the southwest corner of Township 12, the range 11 east; thence east along the south boundary of said township to the southeast corner thereof; thence south along the range line between ranges 11 and 12 east to the thirty-third degree of north latitude, as established and marked on the ground by First Lieut. L. H. Walker, Fifteenth Infantry, United States Army, in compliance with Special Orders, No. 100, series of 1875, Headquarters District of New Mexico; thence east along said thirty-third degree of north latitude to its intersection with the range line between ranges 16 and 17 east; thence north along said range line to the place of beginning.

CHESTER A. ARTHUR.

EXECUTIVE MANSION, *March 24, 1883.*

In lieu of Executive order dated May 19, 1882, setting apart certain lands in New Mexico as a reservation for the Mescalero Apaches, which order is hereby canceled, it is hereby ordered that there be withdrawn from sale or other disposition and set apart, for the use of the said Mescalero Apaches and such other Indians as the Secretary of the Interior may see fit to locate thereon, the tract of country in New Mexico bounded as follows:

Beginning at the northeast corner of township 12 south, range 16 east of the principal meridian in New Mexico; thence west along the north boundary of township 12 south, ranges 16, 15, 14, and 13 east to the southeast corner of township 11 south, range 12 east; thence north along the east boundary of said township to the second correction line south; thence west along said correction line 12 miles; thence south 12 miles; thence east 6 miles; thence south to the thirty-third degree of north latitude, as established and marked on the ground by First Lieut. L. H. Walker, Fifteenth Infantry, U. S. A., in compliance with Special Orders, No. 100, series of 1875, Headquarters District of New Mexico; thence east along said thirty-third degree of north latitude to its intersection with the range line between ranges 16 and 17 east; thence north along said range line to place of beginning.

CHESTER A. ARTHUR.

THE WHITE HOUSE, *March 1, 1910.*

It is hereby ordered that all lands within the Mescalero Apache Indian Reservation, New Mexico, embraced in small holdings claims Nos. 484 and 486, township 13 south, range 12 east, New Mexico principal meridian, as shown on the records of the General Land Office and the blue print attached herewith, be and the same are hereby restored to the public domain.

WM. H. TAFT

THE WHITE HOUSE, *Feby. 17, 1912.*

Under authority of the act of Congress of June 4, 1897 (30 Stat., 11 at 34 and 36), and upon recommendation of the Secretary of Agriculture, it is hereby ordered that on and after March 1, 1912, the boundaries of the Alamo National Forest, New Mexico, as proclaimed March 2, 1909, and modified by subsequent proclamation of October 20, 1910, be further modified by excluding therefrom all of that part of the Mescalero Apache Indian Reservation included in the said Alamo National Forest by the said proclamation of March 2, 1909.

The purpose of this exclusion is to restore the Mescalero Apache Indian Reservation in all respects to the status existing prior to the said proclamation of March 2, 1909, as though the inclusion of the lands within the Alamo National Forest had not been ordered, and said Indian reservation is hereby fully recreated and restored to that status.

WM. H. TAFT.

GILA RESERVATION.

DEPARTMENT OF THE INTERIOR.
OFFICE OF INDIAN AFFAIRS,
May 14, 1860.

SIR: This office having signified to Agent Steck its approbation of the establishment of a reservation in New Mexico for the Gila Apaches, including the Miembres, Mogollon, and Chilicayia Bands of that tribe, he suggests the following boundaries for the same, viz: "Commencing at Santa Lucia Spring and running north 15 miles; thence west 15 miles; thence south 15 miles; thence east 15 miles to the place of beginning.

Agent Steck has been directed to have the boundaries of the reserve, as indicated by him, run out and marked, and to give notice thereof to the surveyor general of New Mexico.

I have, therefore, to request that you will give instructions to that officer to respect the said reserve when in the progress of the public surveys he comes to connect them with the external boundaries of said reserve.

Very respectfully, your obedient servant,

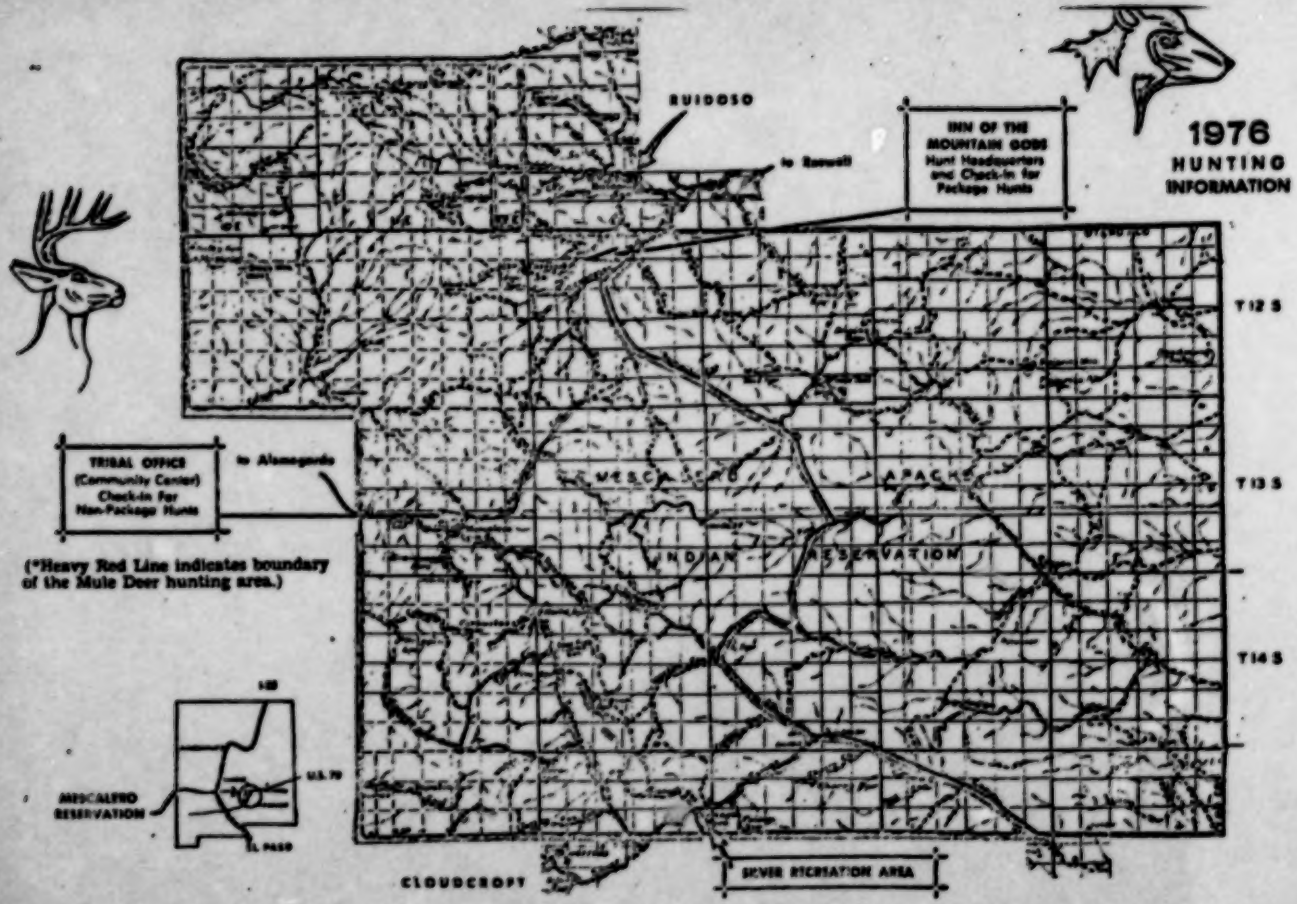
A. B. GREENWOOD,
Commissioner.

Hon. JOSEPH S. WILSON,
Commissioner General Land Office.
(Occupied for a short time only and then abandoned. See Land Office Report for 1872, p. 128.)

HOT SPRINGS RESERVATION.

EXECUTIVE MANSION, *April 9, 1874*

It is hereby ordered that the following-described tract of country in the Territory of New Mexico be, and the same is hereby, withdrawn from sale and reserved for the use and occupation of such


RUIDOSO
to Roswell
INN OF THE MOUNTAIN GODS
Hunt Headquarters and Check-in for Package Hunts
1976
HUNTING
INFORMATION
T12 S
T13 S
T14 S
TRIBAL OFFICE
(Community Center)
Check-in For
Non-Package Hunts
to Alamogordo
MESCA
APACHE
INDIAN
RESERVATION
(*Heavy Red Line indicates boundary of the Mule Deer hunting area.)
MESCALERO
RESERVATION
US 70
CLOUDCROFT
SILVER RECREATION AREA

Plaintiff Exhibit No. 27

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS

REVISED CONSTITUTION OF THE APACHE TRIBE

of the

MESCALERO INDIAN RESERVATION
NEW MEXICO

APPROVED MARCH 25, 1936
REVISED JANUARY 12, 1965

(SEAL)

REVISED
CONSTITUTION OF THE APACHE TRIBE
of the
MESCALERO RESERVATION

PREAMBLE

We, the members of the Apache Tribe of the Mescalero Reservation, in order to promote justice, insure tranquility, encourage the general welfare, foster the social and economic advancement of our people, safeguard our interests, bring our representative tribal government into closer alingment with State and National governments, and secure for ourselves and for our posterity the blessings of freedom and liberty, do hereby establish this revised constitution as the foundation upon which our tribal government shall rest.

ARTICLE I—THE MESCALERO APACHE TRIBE

SECTION 1. The Apache Tribe of the Mescalero Reservation, hereinafter referred to as the Mescalero Apache Tribe, shall include all persons recognized as members thereof, or upon whom membership may be conferred, pursuant to the provisions and restrictions imposed by Article IV of this constitution, irrespective of the Apache Band with which they may be identified.

ARTICLE II—TERRITORY

SECTION 1. The jurisdiction of the Mescalero Apache Tribe, its tribal council and courts shall extend to all the territory within the exterior boundaries of the reservation, and to such other lands as may be added thereto by purchase, gift, Act of Congress, or otherwise.

ARTICLE III—RESERVATION LANDS

SECTION 1. Title to reservation lands shall remain tribal property and shall not, in whole or in part, be granted by allotment or otherwise to tribal members or groups of members as private property. The control of reservation lands, and of assignments or leases thereof, and of other tribal property, shall be in the tribal council, subject to applicable Federal authority, and regulated by ordinances not inconsistent with or contrary to this constitution.

SEC. 2. The tribal council shall have power to assign unused tribal lands, or to reassign any unused assignments, or portions thereof, which have been idle for two (2) or more years. No reassignment of a homestead may be made so long as the original assignee shall reside on the homesite, unless he shall voluntarily release the homesite to the tribe. A member may transfer his homesite to one of his children. The tribal council shall decide by ordinance what shall constitute a unit for purposes of assignment of land for private use, and shall determine the rules governing the use and transfer of such assignments.

SEC. 3. A non-member who is the surviving spouse of a member of the tribe shall have the privilege to use an assignment for the benefit of enrolled minor children, but a non-member shall not acquire any vested interest or rights in any tribal property, except as otherwise provided by ordinance of the tribal council, or by applicable Federal law.

ARTICLE IV—MEMBERSHIP

SECTION 1. The membership of the Mescalero Apache Tribe shall consist of the following persons:

(a) Any person whose name appeared on the Census Roll of the Mescalero Apache Agency of January 1, 1936.

(b) All persons born to resident members after the census of January 1, 1936, and prior to the effective date of this constitution.

(c) Any child born to a non-resident member, prior to the effective date of this constitution, provided that such child shall have resided on the Mescalero Reservation for not less than one (1) year immediately preceding the date of enrollment.

(d) Any person of one-fourth degree or more Mescalero Apache blood, born after the effective date of this constitution, either one or both of whose parents is (are) enrolled in the membership of the Mescalero Apache Tribe.

SEC. 2. No person, being enrolled or recognized as a member of another tribe, shall be eligible for enrollment in the Mescalero Apache Tribe.

SEC. 3. The tribal council shall have the power to adopt ordinances, consistent with this constitution, governing future membership, loss of membership, and the adoption of members into the Mescalero Apache Tribe, which ordinances shall be subject to review by the Secretary of the Interior.

SEC. 4. The tribal council shall have the power to prescribe rules to govern the compilation and maintenance of a membership roll, and to make corrections in the basic roll, subject to the approval of the Secretary of the Interior.

SEC. 5. The constitution of the Mescalero Apache Tribe, and ordinances enacted pursuant thereto, shall govern tribal membership and enrollment. No decree of any non-tribal court purporting to determine membership in the tribe, determine paternity, or determine the degree of Indian blood, shall be recognized for membership purposes. The tribal council shall have sole authority and original jurisdiction to determine eligibility for enrollment, except where the membership of an individual is dependent upon an issue of paternity, in which case the trial court, or the tribal council sitting as an appellate court, shall have authority and exclusive jurisdiction.

ARTICLE V—BILL OF RIGHTS

SECTION 1. Subject to the limitations prescribed by this constitution, all members of the Mescalero Apache Tribe shall

have equal political rights and equal opportunities to participate in the economic resources and tribal assets, and no member shall be denied freedom of conscience, speech, religion, association or assembly, nor shall he be denied the right to petition the tribal council for the redress of grievances against the tribe.

Article VI—Disqualification of Tribal Members for Elective Office

Section 1. No person who has been convicted of any felony or other serious offense, including adultery, bribery, embezzlement, extortion, fraud, forgery, misbranding, perjury, theft, habitual drunkenness, or felonious assault or felonious battery, shall be eligible for candidacy to any elective office of the Mescalero Apache Tribe unless he shall have been pardoned by the President of the Mescalero Apache Tribe in conformity with applicable ordinances and procedures prescribed by the tribal council.

Article VII—Organization of the Government of the Mescalero Apache Tribe

Section 1. The powers of the government of the Mescalero Apache Tribe are divided into three distinct departments, the Legislative, the Executive and the Judicial, and no person or group of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as this constitution may otherwise expressly direct or permit.

Article VIII—Part I—The Legislative Department: Composition and Qualifications

Section 1. The legislative powers of the Mescalero Apache Tribe shall rest in the Mescalero Apache Tribal Council, hereinafter referred to as the tribal council, which shall hold its sessions at the seat of the tribal government.

SEC. 2. The tribal council shall consist of eight (8) members, elected at large from the membership of the Mescalero Apache Tribe.

SEC. 3. The members of the tribal council shall be at least twenty-five (25) years of age at the time of election or appointment (Article X, Section 4); shall have one-quarter or more Mescalero Apache Indian blood; shall have resided on the Mescalero Apache Reservation for a period of at least six (6) months immediately prior to the election, and shall be subject to the restrictions set out in Article VI.

SEC. 4. No person shall serve as a member of the Mescalero Apache Tribal Council while holding any other elective office, or policy making position with the tribe or with any organization doing business on the Mescalero Reservation.

ARTICLE IX—NOMINATIONS AND ELECTIONS

SECTION 1. An election board, appointed by the president of the Mescalero Apache Tribe, shall supervise and administer all elections in accordance with established tribal ordinances, and in conformity with this constitution; provided that no member of the election board shall be at the same time a member of the tribal council or a candidate for tribal office, and provided further that persons so appointed by the president shall be confirmed by the tribal council.

SEC. 2. Any member of the Mescalero Apache Tribe shall have the right to vote in any tribal election provided such member:

(a) Is at least twenty-one (21) years of age at the time of such election.

(b) Has resided within a fifty (50) mile radius of the tribal administration office, which office is located on the reservation, for a period of at least six (6) months immediately prior to the day of election.

SEC. 3. Members of the tribal council, and all other elective officials of the Mescalero Apache Tribe, shall be chosen

by secret ballot, the form of which shall be established by ordinance enacted by the tribal council.

SEC. 4. The tribal council, by ordinance, shall make provision for absentee voting, including the use of a secret ballot for this purpose.

SEC. 5. No member of the Mescalero Apache Tribe shall be deprived of his right to vote, if otherwise qualified, because of temporary absence from the reservation. Temporary absence shall be defined, for purposes of this section, as follows:

(a) Absence for the purpose of attending an educational institution for purposes of obtaining formal training, or

(b) Absence for purposes of receiving treatment at a regular hospital, clinic or sanitarium, or

(c) Absence for purposes of service in the Armed Forces of the United States, or

(d) Absence for purposes of obtaining additional educational training in regularly held training sessions, or

(e) Absence for any other reason which does not exceed six (6) months, duration, immediately preceding a tribal election, without return to the physical limits of the reservation.

SEC. 6. Any qualified member of the Mescalero Apache Tribe who desires that his (her) name be placed on the ballot as a candidate for the office of president, vice-president or council member in the primary election shall file with the tribal secretary a statement of intention showing his (her) name and the office for which he (she) desires to become a candidate. Such statement shall be filed not less than fifteen (15) days preceding the primary election.

SEC. 7. A primary election to select candidates for the offices of the president, vice-president and council members shall be held at least thirty (30) days before the general election of the tribe. The two nominees receiving the highest number of votes for president shall be the only candidates for

the office of president at the next general election. The two nominees receiving the highest number of votes for vice-president shall be the only candidates for vice-president in the next general election. The eight nominees receiving the highest number of votes, for council members shall be the only candidates for council members in the next general election.

SEC. 8. General elections to vote for tribal council members and all elected officers of the Mescalero Apache Tribe shall be held annually on the third Friday of December. Notice of both the primary and general elections shall be posted at least thirty (30) days before each such election at the voting place and in three (3) or more additional public places. Such notice shall be posted by the secretary of the tribal council. In case the time of the general election should conflict with a holiday, the election shall be held on the following work day.

SEC. 9. No candidate shall be permitted to withdraw except by filing a written notice thereof with the tribal secretary at least twelve (12) days before the primary and the general election. The tribal secretary shall post the names of all candidates at the voting place, and at three or more additional public places at least ten (10) days before the primary and general election.

SEC. 10. The first election of tribal council members and officers under this constitution shall be held on the first general election date following its adoption and ratification. The candidate with the highest number of votes for the office of president shall hold the office for two (2) years. The candidate with the highest number of votes for the office of vice-president shall hold that office for two (2) years. The four candidates receiving the highest number of votes for council member-at-large shall hold office for two (2) years. The four candidates receiving the next highest number of votes for council member-at-large shall hold office for one (1) year. Tie votes shall be decided by lot. The term of office for these newly elected council members shall start on the second Friday of the month of January following the election, at which time the incumbent business committee will be dissolved.

SEC. 11. Succeeding members of the Mescalero Apache Tribal Council shall be elected to serve for a term of two (2) years, with one-half of the members-at-large thereof elected each year. The term of office of newly elected members shall start on the second Friday of the month of January following the election.

SEC. 12. The candidate receiving the highest number of votes at the general election for the office of president shall become the president. The candidate receiving the highest number of votes at the general election for the office of vice-president shall become the vice-president.

SEC. 13. The four candidates for the office of councilman-at-large receiving the highest number of votes cast in each general election, and the winning candidates for the office of president and vice-president, shall be certified to the tribal council by the election board as the duly elected councilmen and officers of the tribe.

SEC. 14. No person shall be a candidate for more than one office in any primary election.

SEC. 15. Any tie vote shall be decided by lot before the tribal council.

ARTICLE X—VACANCIES AND REMOVAL FROM OFFICE

SECTION 1. Any member of the tribal council or elected officer of the Mescalero Apache Tribe who, during the term for which he is elected, is convicted of any felony, shall automatically forfeit his office. Any member of the tribal council or elected officer found guilty of a misdemeanor involving moral turpitude, gross neglect of duty, malfeasance in office or misconduct reflecting on the dignity and integrity of the tribal government, may be removed from office by majority vote of the tribal council. Before any vote for removal from office is taken, such member or officer shall be given a written statement of the charges against him at least five (5) days before the meeting of the tribal council before which he is to appear, and he shall be given an opportunity to answer any and all charges

at the designated council meeting. The decision of the tribal council shall be final.

SEC. 2. Upon receipt of a petition signed by at least twenty-five percent (25%) of the eligible voters demanding recall of any member of the tribal council, or elected officer, filed with the secretary of the tribal council at least four (4) months before the expiration of such council member's, or official's, term of office, it shall be the duty of the tribal council to call a special election upon the question of recall. Such election shall be held not less than twenty-five (25) nor more than forty (40) days from the filing of the petition. No council member or elected officer may be recalled unless a majority of the members voting vote in favor of the recall, and unless at least thirty percent (30%) of the eligible voters vote in the election.

SEC. 3. If a member of the tribal council fails to attend two (2) successive meetings of the tribal council or a committee thereof, of which he is a member, or any combination of tribal council or such committee meetings, he shall automatically cease to be a member of the tribal council. In such event, the tribal council shall declare the position vacant and the president shall, subject to confirmation by the tribal council, appoint a successor to serve the unexpired term, unless such member

(a) Is excused by the tribal council, or

(b) Is absent by reason of illness, or due to reasons beyond his control, which are satisfactory to the tribal council.

SEC. 4. In the event of a vacancy, for any cause, in the membership of the tribal council, the unexpired term corresponding to the vacancy shall be filled by a qualified person, appointed by the president and confirmed by the tribal council.

ARTICLE XI—POWERS OF THE TRIBAL COUNCIL

SECTION 1. The Mescalero Apache Tribal Council shall have the following duties and powers subject to all applicable

laws of the United States, this constitution, and the regulations of the Secretary of the Interior.

(a) To veto the sale, disposition, lease, or encumbrance of tribal lands, interest in lands, or other tribal assets, that may be authorized by any agency of government without the consent of the tribe; and any encumbrance, sale, grant, or lease of any portion of the reservation, or the grant of any rights to the use of lands or other assets, or the grant of relinquishment of any water or mineral rights or other natural or fiscal assets of the Mescalero Reservation, are hereby reserved to the sanction of the tribal council.

(b) To encumber, lease, permit, sell, assign, manage or provide for the management of tribal lands, interests in such lands or other tribal assets; to purchase or otherwise acquire lands or other tribal assets; to purchase or otherwise acquire lands or interests in lands within or without the reservation; and to regulate the use and disposition of tribal property of all kinds.

(c) To protect and preserve the property, wildlife and natural resources of the tribe, and to regulate the conduct of trade and the use and disposition of tribal property upon the reservation, provided that any ordinance directly affecting non-members of the tribe shall be subject to review by the Secretary of Interior.

(d) To adopt and approve plans of operation to govern the conduct of any business or industry that will further the economic well-being of the members of the tribe, and to undertake any activity of any nature whatsoever, not inconsistent with Federal law or with this constitution, designed for the social or economic improvement of the Mescalero Apache people, such plans of operation and activities to be subject to review by the Secretary of the Interior.

(e) To use tribal funds as loans or grants, and to transfer tribal property and other assets, to tribal corporations, associations, commissions or boards for such use as

the tribal council may determine in conformity with this constitution and consistent with applicable Federal laws and regulations.

(f) To authorize the president to negotiate contracts, leases and agreements of every description not inconsistent with Federal law or with this constitution, subject to review or approval by the Secretary of the Interior where such review or approval is required by statute or regulations; Provided, that all contracts, leases and agreements so negotiated shall be subject to approval by the tribal council.

(g) To acquire, by condemnation, lands of tribal members on the reservation, for public purposes, provided that such members shall be reimbursed the full value of improvements they have placed on such lands as determined by appraisal. The manner of appraisal and the procedures governing condemnation shall be established by ordinance of the tribal council, subject to review by the Secretary of the Interior.

(h) To regulate its own procedures, including the adoption and amendment of bylaws; to appoint subordinate boards, commissions, committees, tribal officials and employees not otherwise provided for in this constitution and to prescribe their salaries, tenure and duties; to charter tribal corporations, and to charter and regulate other subordinate organizations for economic and other purposes, subject to review by the Secretary of the Interior when required by Federal law or regulation.

(i) To represent the tribe and act in all matters that concern the welfare of the tribe and to make decisions not inconsistent with, or contrary to, this constitution.

(j) To negotiate with the Federal, State, or local Governments, and to advise and consult with representatives of the Interior Department on all activities that may affect the reservation, and in regard to all appropriation estimates and Federal projects for the benefit of the tribe before such estimates or projects are submitted to the Bureau of the Budget and to Congress.

(k) To borrow money from the Federal Government or other lenders for tribal use.

(l) To administer any funds or property within the exclusive control of the tribe, and to make expenditures from available funds for public purposes of the tribe, including salaries and remuneration of elective officials, officers and tribal employees. With the approval of the Secretary of the Interior, tribal funds from any source may be authorized for dividend or per capital payments to the members of the tribe.

(m) To administer charity.

(n) To make loans to tribal members in accordance with regulations of the Secretary of the Interior, this constitution and other applicable laws.

(o) To employ legal counsel for the protection and advancement of the rights of the tribe and its members, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior, so long as such approval is required by Federal law.

(p) To enact ordinances, subject to review by the Secretary of the Interior, establishing and governing tribal courts and tribal law enforcement agencies on the reservation; regulating social and domestic relations of members of the tribe; including provision for the issuance of decrees of divorce, provided that all marriages between tribal members shall be in conformity with applicable laws of the State; providing for the appointment of guardians for minors and mental incompetents; regulating the inheritance of personal property of tribal members; and providing for the removal or exclusion from the reservation of any non-members of the Mescalero Apache Tribe whose presence may be injurious to tribal members or to the interests of the tribe, as determined by the tribal council.

(q) To issue to each of its members a non-transferable certificate of membership, evidencing the equal share of each member in the assets of the tribe, said tribe being in the nature of a non-profit corporation, and to use any net

income return to the tribe from corporate enterprises for public and social purposes of the tribe.

(r) To administer oaths; to require, upon proper notice being given stating time and place of hearing and the general nature of the subject to be discussed, any member of the tribe to appear and give testimony before the tribal council; and to provide by ordinance, subject to review by the Secretary of the Interior, for punishment of such members upon failure to comply with such requirements, or for giving false testimony.

(s) To enact and provide for the enforcement of ordinances, subject to review by the Secretary of the Interior, for the assessment of taxes, licensing and other fees on persons or organizations doing business on the reservation.

(t) No authority or power contained in this constitution may be delegated by the Mescalero Apache Tribal Council to tribal officials, committees, or associations to carry out any functions or do any thing for which primary responsibility is vested in the tribal council, except by ordinance or resolution duly enacted by the tribal council.

(u) To deposit, to the credit of the Mescalero Apache Tribe, tribal funds, without limitation on the amount in any account, in any National or State bank whose deposits are insured by any agency of the Federal Government; Provided, that advances to the tribe from funds held in trust in the United States Treasury shall be deposited with a bonded disbursing officer of the United States whenever the conditions prescribed by the Secretary of the Interior in connection with such advance, require that the advance be so deposited.

(v) To exercise tribal powers independently, under this constitution, whenever limitations on such free exercise of tribal powers, imposed by regulations of the Secretary of the Interior, are removed; to exercise other inherent powers not heretofore exercised or included in this constitution; and to exercise powers which have been excluded from

tribal authority by applicable statutes of Congress, in the event such statutes are amended or rescinded; provided, that except for waiver of Secretarial review or approval authority, the exercise of additional tribal powers, by the tribal council, shall be in conformity with appropriate amendments to this constitution, pursuant to the provisions of Article XV and Article XXVII hereof.

ARTICLE XII—REVIEW AND APPROVAL OF ENACTMENTS

SECTION 1. Every resolution or ordinance passed by the tribal council shall, before it becomes effective, be presented to the president for approval within five (5) days following the date of its passage. If he approves he shall sign it within ten (10) days following its receipt and deposit it with the Secretary of the Mescalero Apache Tribe for such further action as may be necessary. If he does not sign an enactment of the tribal council, he shall, at the next meeting of the tribal council following its submittal to him for signature, return it to the tribal council with a statement of his objections. It shall thereafter not become effective unless it is again approved by two-thirds of the members present, providing that those present constitute a quorum of the tribal council.

SEC. 2. Every resolution or ordinance which, under this constitution is subject to review by the Secretary of the Interior, shall be, within ten (10) days following its approval by the president or, in the event of presidential veto, by a two-thirds majority of the tribal council as provided in Section 1 of Article XII above, presented to the Superintendent of the Mescalero Reservation. Within ten (10) days after receipt thereof, the Superintendent shall approve or disapprove the same.

SEC. 3. If the Superintendent shall approve any resolution or ordinance subject to review by the Secretary of the Interior, it shall thereupon become effective, but the Superintendent shall transmit a copy of the same, bearing his endorsement, to the Secretary of the Interior, who may within ninety (90) days from the date of such approval by the Superintendent rescind

the said resolution or ordinance for any cause, by transmitting notification to the President of the Mescalero Apache Tribe of such rescission.

SEC. 4. If the Superintendent shall refuse or fail to approve any resolution or ordinance submitted to him within ten (10) days after its receipt, he shall advise the tribal council of his reasons therefor, and if the reasons appear to the tribal council to be insufficient it may, by majority vote, refer the resolution or ordinance to the Secretary of the Interior who shall, within ninety (90) days from the date of receipt, approve or disapprove same in writing; Provided, however, that such resolution or ordinance shall become effective ninety (90) days after the date of receipt unless the Secretary of the Interior shall disapprove in writing such resolution or ordinance.

SEC. 5. Any resolution or ordinance that is, by the terms of this constitution, subject to the approval of the Secretary of the Interior, shall be presented to the Superintendent who shall, within 10 days after receipt thereof, transmit the same to the Secretary of the Interior with his recommendation for or against approval.

SEC. 6. The said resolution or ordinance shall become effective when approved by the Secretary of the Interior.

SEC. 7. Upon request by the tribal council, the Secretary of the Interior may waive any requirement contained in this constitution relating to review or approval of resolutions and ordinances, or to the exercise of other powers of the tribal council. Such waiver shall be for such period of time and under such conditions as the Secretary of the Interior may prescribe.

ARTICLE XIII—TRIBAL BUDGET AND BUSINESS ENTERPRISES

SECTION 1. Before the beginning of each fiscal year, the tribal council shall adopt and approve an annual tribal budget providing funds for the support of all approved tribal programs. No expenditures of tribal funds may be made except in conformity with the approved budget. The annual tribal budget shall be subject to such review and approval as may be required by the Secretary of the Interior.

SEC. 2. The Mescalero Apache Tribal Council shall, by ordinance, establish the principles and policies governing the operation and control of all enterprises of the tribe.

ARTICLE XIV—REFERENDUM

SECTION 1. Upon receipt of a petition signed by at least thirty percent (30%) of the qualified voters of the tribe and filed with the secretary of the tribal council demanding a referendum thereon, any proposed or enacted resolution, ordinance or other action of the tribal council shall either be repealed by the tribal council or be submitted by it to the electorate for decision by the tribe in a general election to be held within thirty (30) days after receipt of the petition. The referendum shall be conclusive only if at least thirty percent (30%) of the qualified voters cast their ballots therein.

SEC. 2. When a majority of the members of the tribal council shall request a referendum on any proposed or enacted resolution, ordinance, or other action of the tribal council, the tribal council shall call an election within thirty (30) days thereafter at which the members of the tribe shall approve or disapprove, by majority vote, the ordinance or action in question; Provided, however, that such approval or disapproval shall be effective only in the event thirty percent (30%) or more of the qualified voters cast their ballots in such election.

SEC. 3. No referendum conducted pursuant to the provisions of Section 1 above shall serve to abrogate, modify, or amend any properly approved contract or agreement with third parties who are not members of the Mescalero Apache Tribe.

ARTICLE XV—CONSTITUTIONAL AMENDMENT

SECTION 1. This constitution may be amended at an election called by the Secretary of the Interior upon request by the tribal council:

(a) Whenever, by majority vote of all members of the tribal council, the governing body of the tribe shall

authorize the submission of a proposed amendment to the electorate of the tribe, or,

(b) Whenever a minimum of thirty percent (30%) of the qualified voters of the tribe, by signed petition, shall request such amendment.

SEC. 2. If, at such election, the amendment is adopted by majority vote of the qualified voters of the tribe voting therein, and if the number of ballots cast represents not less than thirty percent (30%) of the qualified voters, such amendments shall be submitted to the Secretary of the Interior and, if approved by him, it shall thereupon take effect.

ARTICLE XVI—SESSIONS OF THE TRIBAL COUNCIL

SECTION 1. The tribal council shall meet, upon 24 hours written notice to the membership thereof by the president, at the seat of tribal government, as provided in the bylaws; Provided, that not less than four (4) quarterly sessions shall be held in any year.

SEC. 2. Special sessions of the tribal council may be convened by the president or, if the president shall refuse to act, such special sessions may be convened by any three (3) members of the tribal council upon twenty-four (24) hours written notice signed by said three (3) members.

ARTICLE XVII—QUORUM; VOTE

SECTION 1. Six (6) members of the tribal council shall constitute a quorum of the membership thereof, provided that the vice-president of the tribe may vote as a member of the tribal council throughout the whole of that meeting only if a quorum is not otherwise present. No enactment of the tribal council shall have any validity or effect in the absence of a quorum of the membership thereof.

SEC. 2. No resolution or ordinance of the tribal council shall have any validity or effect unless it is passed by the tribal council at a legally called session in which a quorum of the membership was present, and until approved by the president or passed over his veto as provided by Article XII.

ARTICLE XVIII—ORDINANCES AND RESOLUTIONS

SECTION 1. All final decisions of the tribal council, on matters of permanent interest to members of the tribe and necessary to the orderly administration of tribal affairs, shall be embodied in ordinances, the format of which shall be established in the bylaws of the tribal council. Such enactments shall be available for public inspection at all reasonable times by members of the tribe.

SEC. 2. All final decisions of the tribal council on matters of temporary interest, or matters relating to particular individuals, officials or circumstances shall be embodied in resolutions. Such actions of the tribal council shall also be subject to public inspection by members of the tribe.

ARTICLE XIX—PART 2—THE EXECUTIVE DEPARTMENT: COMPOSITION AND MANNER OF SELECTION

SECTION 1. The Executive Department of the Mescalero Apache Tribal Government shall consist of a president, a vice-president, a secretary and a treasurer.

SEC. 2. The President and Vice-President of the Mescalero Apache Tribe shall be elected. The remaining officers shall be appointed by the president with the concurrence of the tribal council, and persons appointed to fill such offices shall serve during the pleasure of the president, provided that the tribal council must concur in the removal from office of any such appointive officer of the tribe.

ARTICLE XX—PRESIDENT AND VICE-PRESIDENT: TERM OF OFFICE AND QUALIFICATIONS

SECTION 1. The President and Vice-President of the Mescalero Apache Tribe shall be elected for a term of two (2) years. Candidates for the office of president and vice-president must possess the same qualifications required of candidates for council membership as set forth in Article VIII, Section 3 of this constitution. The term of office of the president and vice-president shall begin at the same time as the terms of members of the tribal council elected at the same election.

ARTICLE XXI—PRESIDENT AND VICE-PRESIDENT: VACANCIES AND REMOVAL FROM OFFICE

SECTION 1. In the event of a vacancy, for any cause, in the office of the president, the vice-president shall assume the duties of the president until a successor has been duly elected and qualified. In the event of a vacancy, for any cause, in the office of the vice-president, such vacancy shall be filled by a tribal member appoined by the tribal council, such person to serve until a successor has been duly elected and qualified. In the event of a vacancy, for any cause, in both executive offices, such vacancies shall be filled at a special election, called by the tribal council and conducted in conformity with applicable sections of Article IX of this constitution; except that the membership of the election board shall be appointed by the tribal council.

ARTICLE XXII—DUTIES OF OFFICERS

SECTION 1. The President of the Mescalero Apache Tribe shall exercise the following powers as the chief executive officer of the tribe:

(a) The president shall serve as the Chairman of the Mescalero Apache Tribal Council, but he shall not have the right to vote on any issue except to break a tie vote of the council in the absence of the vice-president.

(b) The president shall appoint all non-elected officials and employees of the executive department of the tribal government and shall direct them in their work, subject only to applicable restrictions embodied in this constitution or in enactments of the tribal council establishing personnel policies or governing personnel management.

(c) The president, subject to the approval of the tribal council, may establish such boards, committees or subcommittees as the business of the council may require, and shall serve as an ex-officio member of all such committees and boards.

(d) The president shall serve as contracting officer for the Mescalero Apache Tribe, following approval of all contracts by the tribal council.

(e) The president shall have veto power over enactments of the tribal council, as provided in Article XII, Section 1.

(f) Subject to such regulations and procedures as may be prescribed by ordinance of the tribal council, the president shall have power to grant pardons, after conviction for all offenses, to restore tribal members to eligibility for elective office in the tribal government, subject to the restrictions contained in Article X, Section 1.

(g) The president shall direct the tribal police, to assure the enforcement of ordinances of the tribal council.

(h) The president shall hold no other tribal office or engage in private remunerative employment without the consent of the tribal council, during his term as president.

SEC. 2. In the absence of the president, the vice-president shall preside and shall have all powers, privileges and duties of the president.

SEC. 3. The vice-president may function as chairman of the tribal council or of any committee thereof in the absence of, or at the direction of, the president. When presiding as chairman of the tribal council he shall have the right to vote

only in the event the council or any committee thereof is equally divided on an issue. In his capacity as vice-president, he may be counted for purposes of constituting a quorum at any such meeting and when so counted may vote on any business then before the council.

SEC. 4. The vice-president may attend any session of the tribal council or of any council committee and he may participate therein, but he shall not have the right to vote unless required to make a quorum or to break a tie.

SEC. 5. The vice-president shall perform such other duties as the president, with the consent of the tribal council, may direct.

ARTICLE XXIII—THE SECRETARY OF THE MESCALERO APACHE TRIBE

SECTION 1. The Secretary of the Mescalero Apache Tribe shall be appointed from within the membership of the tribal council.

SEC. 2. The secretary shall call the roll, handle all official correspondence of the council, keep the minutes of all regular and special meetings of the tribal council, and it shall be his duty to submit promptly to the Superintendent of the agency copies of minutes of all regular and special meetings of the tribal council. Following each general election, the secretary shall certify to the Superintendent of the reservation the duly elected president, vice-president, and councilmen. In the absence of the president and vice-president, the secretary shall carry on the duties of the president, subject to all restrictions thereon embodied in this constitution.

ARTICLE XXIV—TREASURER OF THE MESCALERO APACHE TRIBE

SECTION 1. The treasurer shall be appointed from within the membership of the tribal council.

SEC. 2. (a) The treasurer shall accept, receipt for, keep and safeguard all funds under the exclusive control of the tribe by depositing them in a bank insured by an agency of the Federal Government, or in an Individual Indian Money Account as directed by the Mescalero Apache Tribal Council, and shall keep an accurate record of such funds and shall report on all receipts and expenditures and the amount and nature of all funds in his custody to the council at regular meetings and at such other times as requested by the council. He shall not pay or otherwise disburse any funds in custody of the council except when properly authorized to do so by the council.

(b) The books and records of the treasurer shall be audited at least once a year by a competent auditor employed by the council, and at such other times as the council may direct.

(c) The treasurer shall be required to give a surety bond satisfactory to the council and the Commissioner of Indian Affairs.

(d) The treasurer shall be present at all meetings of the council unless prevented by circumstances beyond his control.

(e) All checks shall be signed and all vouchers shall be approved for payment by two officers of the tribe as follows: the president or the vice-president, together with the treasurer or, in his absence, the secretary.

(f) In the absence of the president, vice-president, and secretary, the treasurer shall carry on the duties of the president.

SEC. 3. The tribal council may require all responsible tribal officials and employees to be bonded. The premium for the bond shall be paid by the tribe.

ARTICLE XXV—PART III—THE JUDICIARY

SECTION 1. The judicial powers of the Mescalero Apache Tribe shall be vested in the Tribal Courts, including a Trial and Appellate Court. The jurisdiction of the Tribal Courts shall

extend to all matters, criminal and civil, except where prohibited by the Constitution, laws or treaties of the United States of America, and except as such jurisdiction may be otherwise limited from time to time by ordinance of the Tribal Council. (Subject to appr. of Sec. In.)

SEC. 2. The criminal offenses over which the Courts of the Mescalero Apache Tribe have jurisdiction may be embodied in a Code of Laws, adopted by ordinance of the tribal council, and subject to review by the Secretary of the Interior.

SEC. 3. The duties and procedures of the courts shall be determined by ordinance of the tribal council.

ARTICLE XXVI—COMPOSITION OF THE TRIBAL COURTS

SECTION 1. The trial court shall consist of a chief judge and two associate judges, appointed by the President of the Mescalero Apache Tribe, with the concurrence of not less than a three-fourths majority vote of the whole membership of the tribal council.

SEC. 2. The tribal council shall sit as a court of appeals whenever necessary and may hear appeals at any regular or special meeting.

SEC. 3. The tenure and salary of tribal judges shall be established by ordinance of the tribal council.

SEC. 4. No person shall be appointed to the office of tribal judge unless he is an enrolled member of the Mescalero Apache Tribe, not less than 35 years nor more than 70 years of age; nor shall any person be appointed as a tribal judge who has ever been convicted of a felony or, within one year, the last past, of a misdemeanor.

ARTICLE XXVII—INHERENT POWER OF THE MESCALERO APACHE TRIBE

SECTION 1. No provision of this constitution shall be construed as a limitation on the inherent residual sovereign

powers of the Mescalero Apache Tribe. Any such powers, not delegated to the representative tribal government by this constitution, are retained for direct exercise by the people through referendum, as provided for herein, or for exercise by the tribal government following amendment of the constitution.

ARTICLE XXVIII—SAVING CLAUSE AND REPEAL OF PREVIOUS CONSTITUTION

SECTION 1. The Constitution and Bylaws of the Apache Tribe of the Mescalero Reservation, approved on March 25, 1936, under the provisions of Section 16 of the Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378), is hereby repealed and superseded by this constitution.

SEC. 2. All ordinances and resolutions heretofore enacted by the Mescalero Tribal Business Committee shall remain in full force and effect to the extent that they are not inconsistent with this constitution.

SEC. 3. The incumbent tribal business committee and incumbent tribal officers shall remain in office and shall be entitled to exercise all powers granted by this constitution to the tribal council and tribal officers until such time as the first election of the tribal council and tribal officers is held under this constitution.

ARTICLE XXIX—OATH OF OFFICE

SECTION 1. No elective official of the Mescalero Apache Tribe shall be officially installed in the office to which such official is elected unless and until the following oath has been duly administered by a Judge of the Mescalero Apache Tribal Court:

"I, ..., do solemnly swear that I will support and defend the Constitution of the United States against all enemies; that I will faithfully

and impartially carry out the duties of my office, uphold the Constitution of the Mescalero Apache Tribe, and represent the interests of the Mescalero Apache people. These things I will do to the best of my ability, so help me God."

ARTICLE XXX—RATIFICATION OF REVISED CONSTITUTION

SECTION 1. This constitution, when adopted by a majority vote of the qualified voters of the Mescalero Apache Tribe, voting at an election called for that purpose by the Secretary of the Interior, in which at least thirty percent (30%) of those entitled to vote shall cast their ballots, shall be submited to the Secretary of the Interior for his approval, and shall be effective from the date of approval.

CERTIFICATION OF ADOPTION

Pursuant to an election authorized by the Secretary of the Interior on December 11, 1964, the attached Revised Constitution of the Apache Tribe of the Mescalero Reservation was submitted to the qualified voters of the tribe and was on December 18, 1964, duly adopted by a vote of 190 for and 103 against, in an election in which at least 30 percent of the 635 members entitled to vote cast their ballot in accordance with Section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378).

KENNETH L. PAYTON
Chairman, Election Board

CHRISTIE LA PAZ
Election Board Member

ALTON PESO
Election Board Member

APPROVAL

I, John A. Carver, Jr., Under Secretary of the Interior of the United States of America, by virtue of the authority granted me by the Act of June 18, 1934 (48 Stat. 984), as amended, do hereby approve the attached Revised Constitution of the Apache Tribe of the Mescalero Reservation.

Approval recommended:

JAMES E. OFFICER
Associate Commissioner
Bureau of Indian Affairs

JOHN A. CARVER, JR.
Under Secretary of the Interior
[SEAL]

WASHINGTON, D.C., *January 12, 1965*

Plaintiff's Exhibit No. 29

AGREEMENT BETWEEN BUREAU OF SPORT FISHERIES AND WILDLIFE OF THE U. S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, AND THE APACHE TRIBE OF THE MESCALERO RESERVATION

THIS AGREEMENT made this 13th day of April 1959 between the UNITED STATES OF AMERICA, Bureau of 'Sport Fisheries and Wildlife, Fish and Wildlife Service, Department of the Interior acting by its authorized representative, hereinafter called the Bureau, and the Apache Tribe of the Mescalero Reservation, an Indian tribe and a corporation organized and existing under the Act of June 18, 1934, 48 Stat. 984, as amended, hereinafter called the Tribe.

WHEREAS, the waters of the Mescalero Reservation provide a potential for the development and maintenance of fishery resources.

WHEREAS, the development and maintenance of the fishery resources will provide recreation to Tribal members and the public.

WHEREAS, the fishery resources are a source of economic return to the Tribe and its members through the providing of goods and services to the public who will enjoy this resource.

WHEREAS, the Bureau of Sport Fisheries and Wildlife through laws and agreements is responsible for providing assistance in the management of fisheries in areas of Federal interest including Indian Reservations as set forth in the Memorandum of Understanding between the Fish and Wildlife Service and the Office of Indian Affairs dated August 7, 1941.

NOW, THEREFORE, it is agreed:

1. The Bureau will provide technical assistance in the management and development of fishery resources of Reservation waters.

2. The Bureau will provide for stocking Reservation waters. The numbers, size, and species will be determined by Bureau biologists. Stocking program will be based upon biological requirements, fishing pressure, and availability of fish.

3. The Tribe will designate those waters of the Reservation which shall be open to public fishing and the waters so designated shall receive first priority for bureau assistance outlined in sections 1 and 2 above.

4. The Tribe will establish regulations for the conservation of the fishery resources. Insofar as possible said regulations shall be in agreement with State regulations.

5. Employees of the Bureau while carrying out the activities set forth herein shall at any time have access to Reservation waters and may conduct biological investigation in such manner as the Bureau may determine to be necessary.

6. The Bureau will provide the Tribe with reports of its activities on the Tribal Reservation waters at least once each year.

7. This agreement shall be in force and effect for two years following the date of execution and shall continue in effect each year thereafter unless cancelled by either party. Said cancellation shall be in writing and submitted at least 90 days prior to the annual renewal date.

8. In fulfilling the terms of this agreement, the cooperating agencies shall not discriminate against any employee or applicant for employment because of race, creed, color, or national origin and shall require an identical provision to be included in all sub-contracts.

9. Pursuant to the requirements of section 22 of Title 41 of the United States Code, it is an express condition of this agreement that no Member of or Delegate to Congress, or any Resident Commissioner, shall be admitted to any share or part of this agreement, or to any benefit to

arise therefrom, unless the agreement is made with a corporation for its general benefit.

10. This agreement is made contingent on the availability of funds for the expenditures contemplated hereunder. In case such funds as may be necessary to carry out the terms of this agreement are not available, the respective parties are released from liability hereunder to the extent that such funds are not available.

CONCURRED:

/s/ JOHN C. GATLIN
Regional Director

/s/ CLINTON O. FALLEY
Superintendent

/s/ VIRGINIA KLINEKOLE
Tribal Chairman

AN AMENDMENT TO THE AGREEMENT BETWEEN BUREAU OF SPORT FISHERIES AND WILDLIFE OF THE U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, AND THE APACHE TRIBE OF THE MESCALERO RESERVATION

Section 2 of the Agreement between Bureau of Sport Fisheries and Wildlife of the U.S. Fish and Wildlife Service, Department of the Interior and the Apache Tribe of the Mescalero Reservation dated 13th day of April 1959 is hereby amended by adding the following:

> "Whenever possible the Tribe will assist in the distribution of fish in accordance with the stocking program. The Bureau will provide such equipment for the purpose as it may have available."

CONCURRED:

/s/ HERBERT A. JOHNSON
Superintendent
Date 7-7-61

/s/ JOHN A. GATLIN
Regional Director
Date 7/10/61

/s/ FRED PELLMAN
Tribal Chairman
Date 7-7-61

Plaintiff's Exhibit No. 31

MESCALERO APACHE TRIBE
MESCALERO, NEW MEXICO

ORDINANCE NO. 77-1

Pursuant to Article 11, Section 1 (c) of the Revised Constitution of the Mescalero Apache Tribe and pursuant to 18 U.S.C. 1165 (added Pub. L. 86-634, Section 2, July 12, 1960, 74 Stat. 469) the Tribal Council of the Mescalero Apache Tribe is authorized to adopt ordinances for the protection and preservation of property, wildlife, and natural resources of the Tribe. The Tribal Council of the Mescalero Apache Tribe hereby adopts the following ordinance pertaining to hunting and fishing within the exterior boundaries of the Mescalero Apache Reservation to provide such preservative and protection of its wildlife.

1. Except for enrolled members of the Mescalero Apache Tribe, no person shall hunt or fish within the exterior boundaries of the Mescalero Apache Reservation without having in his or her possession the appropriate license issued by the Tribe. No state license of any kind shall be necessary for any person. License fees shall be established by the Tribal Council.

2. No person shall hunt or fish within the exterior boundaries of the Mescalero Apache Reservation except at such times as may be provided by the Tribal Council.

3. No person shall take any game in quantities exceeding those established by the Tribal Council.

CERTIFICATION

The foregoing enactment of the Mescalero Apache Tribal Council is duly adopted and approved on January 14, 1977 at a legally called session of the Mescalero Apache Tribal Council, at which a quorum was present and at which a majority of the members voted in favor thereof. This enacement is approved by the President of the Mescalero Apache Tribe under authority of Article XII, Section 1, of the Revised Constitution.

/s/VIRGINIA KLINEKOLE

Virginia Klinekole, Secty
Pro Tempore

/s/WENDELL CHINO

Wendell Chino, President

Plaintiff's Exhibit 32

MESCALERO APACHE TRIBE
Mescalero, New Mexico
ORDINANCE NO. 77-7

WHEREAS, Ordinance No. 77-1 of the Mescalero Apache Tribe provides that the Tribal Council shall establish hunting and fishing seasons, bag limits and license fees for persons hunting and fishing on the Mescalero Apache Reservation to ensure the protection and preservation of property, wildlife and natural resources; and

WHEREAS, The Tribal Council is authorized to take this action pursuant to its Revised Constitution;

NOW, THEREFORE, the following provisions are hereby adopted for the period May 1, 1977 to April 30, 1978.

MESCALERO APACHE HUNTING AND FISHING PROCLAMATION

Mescalero, New Mexico
1977

Pursuant to Ordinance No. 77-1 of the Mescalero Apache Tribe, the Tribal Council hereby adopts the following rules and regulations governing hunting and fishing on the Mescalero Apache Reservation.

I.

HUNTING REGULATIONS:

A. Season, bag limits and license fees:

1. Enrolled members of the Mescalero Apache Tribe, (including minors 16 years of age or older adopted by non-Mescalero families).

a. Deer and Turkey: Tribal members may hunt deer and turkey of either sex, August through December 1977. There are no bag limits and no fees or licenses required.

b. Bear: No restrictions on the season and no bag limits or fees or license required.

c. Elk: 50 license shall be issued to tribal members as follows: 10 bull license and 40 cow license with a bag limit of 1 bull with at least 5 points on at least one antler or one mature cow. Season shall be September 25 through October 10, 1977.

License shall be issued on a drawing basis for bulls and cows. Only the head of the family is eligible for the drawing and tribal members who drew elk license during the 1973, 1974, 1975 or 1976 elk hunts will not be eligible for the 1977 hunt. The cost of each elk license is $40.00. Allowable caliber and bullet weights for elks:

Caliber:	Bullet Weight:
6.5 MM (.265)	140 gr.
.270	150 gr.
.7 MM	150 gr.
.30	180 gr.
.388 or larger	210 gr.

d. Antelope: 15 buck and 15 doe license will be issued. The season shall be September 10 through September 14, 1977, inclusive. Bag limit—1 buck or 1 doe. License will be issued on a drawing basis (only the head of the family is eligible for the drawing). License will cost $10.00. The hunting area is restricted to Dead Man, Red Lake, and Spur Pasture area (see attached map for hunting area). Tribal members who drew antelope

license during the 1974, 1975 or 1976 tribal hunts will not be eligible for the 1977 antelope hunt.

2. Employees of the Mescalero Apache Tribe, tribal-affiliates and non-Indian federal government law enforcement personnel.

   a. The season for all game for which hunting is allowed for the above-referenced persons shall be November 5 through 13 of 1977, inclusive.

   b. Bag limit and license fees:

      (1) Deer and turkey—one deer and turkey of either sex. One license shall be issued to cover both deer and turkey. The cost shall be $45.00 except for affiliates for whom there shall be no fee.

      (2) Bear—1 Bear. License is $30.00 and tribal affiliates are not eligible.

      (3) Elk—None allowed.

      (4) Antelope—None allowed.

   c. Employee license are available to employees of BIA-Mescalero Agency; PHS Hospital; Bent Mescalero School employees; Mescalero National Fish Hatchery; Mescalero Apache Tribe (limited to 3 permanent employees of the Inn of the Mountain Gods and 3 permanent employees of the Ski Area, said employees to be selected by management of each respective enterprise); Cattle Growers, Inc. Only the employee family will be eligible for the one employee license. There will be a $60.00 charge for an additional license for an immediate dependent, who must be 16 years of age or older.

   d. Hunting by tribal employees shall be restricted to the east side of the reservation.

e. All tribal affiliates must have their spouse accompany them during any hunting period. Violation of this regulation can result in the suspension of all hunting privileges for a year and a quarter.

f. Tribal affiliate for purposes of the proclamation shall include all non-members married to enrolled members of the Mescalero Apache Tribe and non-members who have adopted minor members of the Mescalero Apache Tribe living in their home for a period of at least one year preceeding issuance of permit.

g. One permit will be given to each Church. The head of the Church shall designate one recipient of the permit.

3. General Public.

1977 PUBLIC HUNTS
MESCALERO APACHE RESERVATION

	ANTELOPE	BEAR:	BULL ELK- (Package Hunt)*
Date:	Aug. 29—Sept. 2	Sept. 6-14	Sept. 23-28 Sept. 30-Oct. 5
Bag Limits:	1 Buck	1 Bear (No Cubs)	1 Bull w/five points on one antler 1 Bear (No Cubs)
Hunt Area:	Deadman, Red Lake & Spur Well Pastures	All Revervation	All Reservation
No. Permits:	10	25 w/o Dogs	50 Bulls** 50 Bear**
Price:	$500.00	$100.00 w/o Dogs	$2000.00
Other:	Check in & Out	Guides Required Check in & Out	Check in & Out at the Conservation Office at the Inn of the Mountain Gods.

* A Package Hunt sold at the Inn of the Mountain Gods will be offered for 50 Bull Elk-Bear permits and 100 Mule Deer permits.

** 25 Bull permits and 25 Bear permits will be issued each week for the above two weeks.

*** 25 Deer permits will be issued each week for the above weeks.

	MULE DEER: (Package Hunt)*	MULE DEER
Date:	Oct. 24-27 Oct. 31-Nov. 3 Nov. 7-10 Nov. 14-17	Nov. 26-Dec. 11
Bag Limits:	1 Buck, 1 Doe and Fishing	1 Buck & 1 Doe
Hunt Area:	All Reservation	All Reservation
No. Permits:	100***	150
Price:	$600.00	$200.00
Other:	Check in and out at the Conservation Office at the Inn of the Mountain Gods	Check in and out at the Conservation Office.

* A Package Hunt sold at the Inn of the Mountain Gods will be offered for 50 Bull Elk-Bear permits and 100 Mule Deer permits.

** 25 Bull permits and 25 Bear permits will be issued each week for the above two weeks.

*** 25 Deer permits will be issued each week for the above weeks.

B. General Provisions Applicable to All Persons:

1. It is illegal for non-hunters to haul or accompany Indian hunters around the Reservation to hunt. Any person violating this provision shall be fined $100.00.

2. It is illegal to use artificial light in connection with hunting any game animal. Any person violating this provision shall be fined *$300.00.*

3. Any person killing an elk without a license to do so shall be fined $1,000.00 and shall forfeit the trophy and meat.

*4. Any person killing a bear without a license to do so shall be fined *$300.00* and shall forfeit the trophy and meat.

*5. Any person killing a deer without a license to do so shall be fined *$150.00* and *$300.00* for second offense and shall forfeit the trophy and meat.

6. Any person killing a turkey without a license to do so shall be fined $150.00 and $300.00 for second offense and shall forfeit the trophy and meat.

7. Any person killing other game without a license to do so shall be fined $150.00 and shall forfeit the trophy and meat.

8. All persons violating any provision of this proclamation relating to hunting shall be subject to the jurisdiction of the tribal court.

9. The sale or barter of any portion of a game carcass is strictly prohibited. Penalty $300.00 fine.

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* Does not apply to Tribal members

C. No complimentary permit will be issued by anyone without approval of the Mescalero Apache Tribal Council.

FISHING REGULATIONS:

A. Enrolled members of the Mescalero Apache Tribe are not required to procure licenses and are not subject to area, seasonal or catch limits. All other persons are subject to the following:

1. Legal areas, season, catch limits and fees:

a. Ruidoso Recreation Area and Eagle Creek Recreation Area:

Opening Date: May 14, 1977
Closing Date: September 11, 1977

Fees:

Fishing:	$2.00 Adult—12 catch limit per day; $1.00 Child—6 catch limit per day; (under 14 years of age)
Overnight:	$2.50 first 2 persons + .50 each additional person.
Picnic:	$2.00/car or .50 per person in bus.

b. Silver Springs:

Opening Date:	May 14, 1977
Closing Date:	To be posted (generally open until lake freezes)

Fees:

Fishing:	$2.00 Adult—12 catch limit per day; $1.00 Child—6 catch limit per day; (under 14 years of age)
Overnight:	$5.00 first two persons + .50 each additional person.
Picnic:	$2.00 per car or .50 per person in bus.

(Overnight camping includes trailer hookups with water, sewer and electricity at Silver Springs).

NO RESERVATIONS ARE NECESSARY FOR OVER-NIGHT CAMPING—SERVICE IS ON A FIRST COME —FIRST SERVED BASIS.

c. Licenses issued for other areas or lakes are NOT valid at Lake Mescalero or Cienigita Lake. Special permits are required to fish at those two lakes.

Lake Mescalero and the Cienegita Lakes Recreation Area are facilities of the Inn of the Mountain Gods and permits for fishing are available at the Inn.
No picnicking is permitted on Lake Mescalero and no camping is permitted at Lake Mescalero or Cienegita Lake.

Cienegita Lake opens May 20, 1977 and closes October 31, 1977.

Lake Mescalero is open year round.

Fees at either or both lakes:

	Guest Adult	Guest Child	Non-Guest Adult	Non-Guest Child
Fishing:	$5.00	$2.50	$7.00	$3.50
Catch Limit Per Day.....	12	6	12	6
Picnic:	—Guests Free—		$2.00 per car first two persons + .50 each additional person at Cienegita Lake Only.	

2. Season Permits, affiliates and Employee Licenses:

a. Affiliates may receive a free license at Mescalero Tribal Offices. However, affiliates must have the license in their possession at all times when fishing.

b. A season permit for fishing only, valid for entry and use at the above three recreation

areas, is available to the general public for a fee of $35.00 at the Mescalero Tribal Office. The permit does not include the fee charged for picnic area usage or camping.

c. Employees license are available to employees of BIA-Mescalero Agency; PHS Hospital; Bent Mescalero School Employees; Mescalero National Fish Hatchery; Mescalero Apache Tribe (including the Ski Area and Inn of the Mountain Gods); Cattle Growers, Inc. Only the employee family will be eligible for the one employee license. There will be a fee of $25.00. The License does not include the fee charged for picnic area usage or camping. Daily fees are collected at the gate of each Recreation Area and permits are valid only at the area where fee is collected.

3. It shall be unlawful for any person to:

a. Have more than one line in the water per licensed fisherperson.

b. Use any boats, rafts, canoes or other flotation equipment at any time.

c. Fish on any other waters of the Mescalero Indian Reservation EXCEPT as specifically set forth therein and EXCEPT for areas in which concessionaries are authorized to issue permits.

d. Fish with more than one pole while angling in all trout waters.

e. Deposit litter in or pollute any waters or the bank of such waters.

f. Leave a campfire burning and unattended.

g. Leave any fishing pole or hand line unattended.

h. Snag, net, seine, trap, grapple or otherwise catch fish.

B. Jurisdiction, Fines and Penalties:

1. Any person violating any provision of this proclamation relating to fishing shall be fined a minimum of $25.00.

2. Any person violating any provision of this jurisdiction relating to fishing shall be subject to the jurisdiction of the tribal court.

3. Any person who has in his possession more fish than legally permitted shall forfeit all of his catch then in his possession and shall pay a fine of $25.00 per fish in excess of the limit.

C. No complimentary permits will be issued by anyone without approval of the Mescalero Apache Tribal Council.

NOTE: THE STATE OF NEW MEXICO AND THE MESCALERO APACHE TRIBE ARE PRESENTLY INVOLVED IN A CONTROVERSY REGARDING THE ISSUE OF WHETHER OR NOT A NEW MEXICO HUNTING OR FISHING LICENSE IS REQUIRED OF A NON-INDIAN IN ORDER TO HUNT OR FISH ON THE MESCALERO RESERVATION. THE TRIBE MAINTAINS THAT NO STATE LICENSE IS NECESSARY, BUT ACCEPTS NO RESPONSIBILITY FOR ANY CONSEQUENCES WHICH MAY BE SUFFERED BY REASON OF FAILURE TO OBTAIN A STATE LICENSE. CURRENT INFORMATION REGARDING THIS CONTROVERSY IS AVAILABLE AT TRIBAL OFFICES, MESCALERO, NEW MEXICO 88340.

CERTIFICATION

The foregoing enactment of the Mescalero Apache Tribal Council was duly adopted and approved on June 17, 1977, at a legally called session of the Mescalero Apache Tribal Council, at which a quorum was present and at which a majority of the members voted in favor thereof. This enactment is approved by the President of the Mescalero Apache Tribe under authority of Article XII, Section 1, of the Revised Constitution.

'S/ KEITH MILLER
'S/ WENDELL CHINO

Keith Miller, Secretary
Wendell Chino, President

Plaintiff's Exhibit No. 39

1977 PUBLIC HUNTS
MESCALERO APACHE RESERVATION

Conservation Office Mescalero Apache Tribe P.O. Box 176
Mescalero, NM 88340

Antelope	Bear	Mule Deer	Package Hunt* Bull-Elk	Package Hunt* Mule Deer
August 29- September 2	Sept. 6-14	November 26- December 11		
Bag limit: 1 buck	Bag limit: 1 bear (no cubs)	Bag limit: 1 buck & 1 doe	*FOR PACKAGE - HUNT Contact: Mark W. Daniels The Inn of the Mountain Gods P.O. Box 259 Mescalero, New Mexico 88340 Phone: 505-257-5141	
Hunt area: Deadman, Red Lake, Spur Well Pastures	Hunt area: All Reservation	Hunt area: All Reservation		
Permits: 10	Permits: 25 (w/o dogs)	Permits: 150		
Price: $500.00	Price: $100.00 (w/o dogs)	Price: $200.00		
Other: Check in & out	Other: Guides required Check in & out	Other: Check in & out at Mescalero Conservation Office.		

GENERAL PROVISIONS APPLICABLE TO ALL PERSONS:

1. It is illegal for non-hunters to haul or accompany Indian hunters around the Reservation to hunt. Any person violating this provision shall be fined $100.00.

2. It is illegal to use artificial light in connection with hunting any game animal. Any person violating this provision shall be fined $300.00.

3. Any person killing an Elk without a license to do so shall be fined $1000.00 and shall forfeit the trophy and meat.

4. Any person killing a bear without a license to do so shall be fined $300.00 and shall forfeit the trophy and meat.

5. Any person killing a deer without a license to do so shall be fined $150.00 and $300.00 for second offense and shall forfeit the trophy and meat.

6. Any person killing a turkey without a license to do so shall be fined $150.00 and $300.00 for second offense and shall forfeit the trophy and meat.

7. Any person killing other game without a license to do so shall be fined $150.00 and shall forfeit the trophy and meat.

8. All persons violating any provision of this proclamation relating to hunting shall be subject to the jurisdiction of the tribal court.

9. The sale or barter of any portion of a game carcass is strictly prohibited. Penalty: $300.00 fine.

Hunt Permit Application
Mescalero Apache Reservation

Conservation Department (505-671-4427)

Mescalero Apache Tribe
P.O. Box 176
Mescalero, New Mexico 88340

Name _____

Address _____

_____

Bus. Ph. _____ Home Ph. _____
Driver's Lic. No. _____
Vehicle Lic. No. _____
Vehicle Description _____
Make Year
Color
Emergency contact _____
Emergency Phone _____
Applicant Description:
Soc. Sec. No. _____ Sex ____
Height ____ Weight ____ Hair ____ Eyes ____
Birthdate _____

Antelope August 29—Sept. 2
( ) $500.00

Bear Sept. 6—Sept. 14
( ) $100.00
Mule Deer Nov. 26—Dec. 11
( ) $200.00
Calibre of Firearms _____

The above seasons are processed through the Mescalero Conservation Department. For package hunts, contact the Inn of the Mountain Gods (505-257-5141)
Mule Deer package hunt: $600.00
Bull Elk package hunt: $2000.00

+ + + + + + + + +

While on the Mescalero Apache Reservation I promise to abide by all rules and regulations of the Mescalero Apache Tribe, or will be subject to prosecution for violations. It is further understood that violation of game regulations will result in prosecution.

_____
Applicant Signature

_____
Date

Enclose Cashier's Check, Certified Check or Money Order, payable to the *Mescalero Apache Tribe*, in amount to cover permits requested. (No personal checks, but cash will be accepted in person.)

IMPORTANT

The State of New Mexico and the MESCALERO APACHE TRIBE are presently involved in a controversy regarding the issue of whether or not a New Mexico hunting or fishing license

is required of a non-Indian in order to hunt or fish on the Mescalero Reservation. The Tribe maintains that no State license is necessary, but accepts no responsibility for any consequences which may be suffered by reason of failure to obtain a State license. Current information regarding this controversy is available at Tribal Offices, Mescalero, New Mexico 88340

Plaintiff's Exhibit No. 42

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Albuquerque Area Office
P.O. Box 8327
Albuquerque, New Mexico 87108

Memorandum November 7, 1977

To: Superintendent, Mescalero Agency
From: Area Director
Subject: Tribal Ordinances Nos. 77-1 and 77-7

The Mescalero Apache Tribal Council on January 14, 1977 adopted Ordinance No. 77-1 pertaining to hunting and fishing within the exterior boundaries of the Mescalero Apache Reservation. Ordinance No. 77-7 is the related enactment providing for specific regulations regarding hunting and fishing.

For some unexplained reason, no action was taken on these documents by this office. However, we now have reviewed the ordinances and find no objections to their contents. We find these to be legally sufficient and in conformity with the tribe's Revised Constitution.

Pursuant to the delegated authority of the Area Director, Ordinances No. 77-1 and No. 77-7 are hereby approved effective January 14, 1977.

/s/ LOYD E. NICHOLSON
Acting Area Director

Plaintiff's Exhibit 43

The Apache Tribe of the Mescalero Reservation

P.O. Box 176
Mescalero, New Mexico 88340

April 25, 1969

New Mexico Department of Game & Fish
Santa Fe, New Mexico

Dear Sir:

The Mescalero Apache Tribal Council has encountered several unauthorized parties on the Mescalero Reservation performing surveys, explorations, and other activities without the permission of the Mescalero Apache Tribal Council.

Each time that this happens, it appears that there has been a breakdown in communications between the agency in trespass and the Mescalero Apache Tribal Council.

The purpose of this letter is to inform your agency that permission must be secured in advance from the Mescalero Apache Tribal Council President before any members of your agency enter into the Mescalero Apache Tribal Reservation, for any reason whatever. Permission is generally granted when there is a good reason for your agency to pursue your activities on the Mescalero Apache Reservation.

In order to avoid future misunderstandings, will you kindly secure a permit from the Tribal President. The permit will state the nature of your business, the general area you will be in while on the Reservation, and the time required to perform your mission.

Yours very truly,

/s/ WENDELL CHINO,

Wendell Chino, *President*
Mescalero Apache Tribal Council

Plaintiff's Exhibit No. 44

State of New Mexico

DEPARTMENT OF GAME AND FISH
STATE CAPITOL
SANTA FE
87501

July 14, 1969

Mr. Wendell Chino, President
Mescalero Apache Tribal Council
P. O. Box 176
Mescalero, New Mexico 88340

Dear Mr. Chino:

Reference is made to your letter of April 25, 1969, directed to this Department and concerning the entry of our personnel on the Mescalero Reservation for purposes of performing game and fish management work in cooperation with tribal officials.

While I recognize that your letter was not specifically aimed at our Department or field personnel, I feel that I must have more specific information from you in order that we may avoid any possible conflict and hopefully continue the fine cooperation which has existed between the Mescalero Tribal Council and our Department in past years.

I want to assure you that we recognize the absolute authority of the Tribal Council in denying entry on the Reservation for wildlife management or wildlife law enforcement purposes. I am sure, however, that you recognize that our Department and field personnel have always cooperated closely with tribal officials and that we would find it impossible to continue this type of close cooperation if our entry onto the Reservation is in any way restricted. I know that you will remember our efforts in behalf of the Mescalero Tribe in working out arrangements for elk plantings on the Reservation. We want to continue this type of close cooperation but, at this particular point, I am uncertain as to your wishes in this regard.

I would appreciate your reviewing your April 25 letter and advising me more specifically of your intent in this respect.

Very truly yours,

/s/LADD S. GORDON

Director

BC: Phil Freeman
Marion Embrey
Charles Cockerell
Jim Peckumn
Doug C. Robinson, BIA, Albuquerque

R

B.1 [illegible]
[illegible]

Treaty with the Mescalero Apaches, of the 14th June 1855; in three Articles

THE NATIONAL ARCHIVES
Washington, D. C.

RECORD GROUP NO. 11, GENERAL RECORDS OF THE UNITED STATES GOVERNMENT. Treaty between the United States and the Mescalero Apache, signed at Fort Thorn in the Territory of New Mexico on June 14, 1855. (No. [illegible] Unratified)

A -

Articles of Agreement and Convention made and concluded at Fort Thorn, in the Territory of New Mexico, this 14th day of June one thousand eight hundred and fifty four by Brevet Major [illegible] duly appointed for that purpose on the part of the United States, and the undersigned Chiefs, Captains and Head men of the Mescalero Apache tribe or nation of Indians, they being duly authorized and acting for and in behalf of their respective bands.

Article 1st There shall be perpetual peace, friendship and amity between the United States of America and the Mescalero Apache tribe or nation of Indians, and this convention, and every article and stipulation thereof, shall be perpetual, and observed and performed in good faith.

Article 2nd The Mescalero bands of the Apache tribe of Indians do hereby severally and upon their personal obligations, that peaceful relations shall be maintained amongst themselves, and all the bands, tribes and nations of Indians within the United States, and that they will abstain from committing hostilities or depredations in future, and cultivate mutual good will and friendship.

Article 3rd The Mescaleros hereby cede, and forever relinquish to the United States, all title or claim whatsoever, which they have or ever have had to lands on the East side of the Rio Grande, together, with all other lands within the Territory of New Mexico, except, so much as is hereinafter reserved to them. And the Mescaleros further agree and bind themselves to remove to and settle on the lands reserved to them within one month after the date of this instrument, without any cost or charge to the United States whatever for their removal; and that they will cultivate the soil, and raise flocks and herds for a subsistence, and that the President may withhold the annuities herein stipulated to be paid, or any part thereof, should the Indians shall violate, fail or refuse to comply with any provision of this instrument, or to cultivate the soil in good faith.

Article 4th The United States agree to and grant and withhold from sale, for the use of the Mescaleros for their permanent homes, and hereby guarantee to them the possession and enjoyment of a tract of Country within that portion of the Territory of New Mexico now claimed by the Mescaleros to be bounded as follows to wit: beginning at the most southern point of the Rey Canon - thence running due west fifteen miles, thence North to a point equi distant between the Sabinoso and Galinoso Creeks - thence East to the Pecos river, thence down said river to a point

THE NATIONAL ARCHIVES
Washington, D. C.
These certificates

RECORD GROUP NO. 11, GENERAL RECORDS OF THE UNITED STATES GOVERNMENT. Treaty between the United States and the [illegible] Apache, signed at Fort Thorn in the Territory of New Mexico on June 14, 1854 (No. 97a, Treaties).

East of the beginning, thence West to the beginning - and the United States are hereby authorized to define the boundaries of the reserved tract, whenever it may be necessary by actual survey, and the President may, from time to time, at his discretion, extend the whole or any part thereof, to be surveyed, and may assign to each head of a family or single person over twenty one years of age, twenty acres of land for his or her separate use and benefit, and to each family of three and not more than five persons, forty acres; and to each family of five or more persons, sixty acres; and he may at his discretion, as fast as the occupant becomes capable of transacting their own affairs issue patents therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose, and he may also at his discretion, make rules and regulations, respecting the disposition of the lands in the case of the death of the head of a family or single person, occupying the same, or in case of it's abandonment by them - and he may also assign other lands in exchange for mineral lands, if any such are found in the tract herein set apart - And he may also make such changes in the boundaries of such reserved tracts as shall be necessary to prevent interference with any vested rights - All necessary roads, highways and railroads, the lines of which may run through the reserved tract shall have the right of way through the same, compensation being made therefor, as in other cases: but, the President may grant the right of way to any such roads free of charge.

Article 5th In Consideration of, and full payment for the Country ceded, and the removal of the Mescaleros, the United States agree to pay to the Mescaleros the following sums without interest, to wit; The United States will during the years 1856, 1857 and 1858, pay to the Mescaleros six thousand dollars each year, during the year 1859, and the ten next succeeding years thereafter, a sum of four thousand each year; and during the year 1869 and the next succeeding twenty years thereafter, the sum of two thousand dollars each year.

All of which annual sums of money shall be paid to the Mescaleros or expended for their use and benefit under the direction of the President of the United States, who may from time to time, determine, at his discretion what proportion of the annual payments in this article provided for, if any, shall be paid to them in money, and what proportion shall be appl

THE NATIONAL ARCHIVES
Washington, D. C.

RECORD GROUP NO. 11, GENERAL RECORDS OF THE UNITED STATES GOVERNMENT. Treaty between the United States and the Mescalero Apache, signed at Fort Thorn in the Territory of New Mexico on June 14, 1855. (No. 374-A, Unratified)

Terms Conditions

to and expended, for their moral improvement and education, for such benificial objects as in his judgment will be calculated to advance them in civilization, for building, opening farms, breaking lands, providing stock, agricultural implements, seeds &c, for employing farmers, to teach the Indians to cultivate the soil, for clothing, provisions and merchandize, for iron, steel, arms and ammunition, for mechanics and tools, and for medical purposes.

Article 6th The annuities of the Indians, shall not be taken to pay the debts of individuals, but satisfaction for depredations, committed by them, shall be made by the Indians in such manner, as the President may direct. Nor shall any part of the amounts stipulated to be paid, now be applied by the chiefs or head men to the payment of tribal debts or obligations, to traders or other persons.

Article 7th No spirituous liquors shall be made, sold or used on any of the lands set apart for the residence of the Indians, and the sale of the same, shall be prohibited, in the Territory hereby ceded, until otherwise ordered by the President.

Article 8th The laws now in force or which may hereafter be enacted by Congress for the regulation of trade and intercourse with the Indian tribes, shall continue and be in force within the Country set apart for the use of the Mescaleros and such portions of said laws as prohibit the introduction, manufacture, use of and traffic in ardent spirits, in the Indian Country, shall continue and be in force in all the Country ceded, until otherwise provided by law.

Article 9th The Mescaleros do hereby agree and bind themselves to make restitution or satisfaction, for any injuries done by any band or individual, to the people of the United States, and to surrender to the proper authorities of the United States, when demanded, any individual or individuals, who may commit depredations, to be punished according to law. And if any citizen of the United States shall at any time commit any depredation upon the Indians - the Mescaleros agree, that they will not take private revenge or satisfaction themselves - but instead thereof, they will make complaint to the proper Indian Agent for redress. And the said Indians further agree, to refrain from all warlike incursions into the Mexican provinces, and from committing depredations upon the inhabitants thereof.

Article 10th This treaty shall be obligatory on the contracting parties as soon

RECORD GROUP NO. 11, GENERAL RECORDS OF THE UNITED STATES GOVERNMENT. Treaty between the United States and the Mescalero Apache, signed at Fort Stanton in the Territory of New Mexico on June 14, 1855 (No. 374-A, Unratified).

THE NATIONAL ARCHIVES Washington, D. C.

Indian Treaties

as the same shall be ratified by the President and Senate of the United S

In testimony whereof, the said David Meriwether Commissioner as a
said, and the undersigned Chiefs of the said tribe of Kansas Indians
set their hands and seals, at the place and on the day and year herein
written.

Witnesses: D. Meriwether [illegible]

Richard G. Ewell [illegible] on the part of the United
Captain 1st Dragoons
A. C. Steele
D.M.I.A.
Saml. Ellis Boyd
Interpreter
Estevan Ochoa
Interpreter
M. Steck
Ind Agent

Carranguita his mark
Plumas his mark
Vuelto his mark
Vieja his mark
Copas his mark
Lorette his mark
Manuelito his mark
Monte his mark
Bodita his mark
Monchito his mark
Francisco his mark
Romulo his mark
Jose Largo his mark
Estrellita his mark
Manuelito his mark
Mariano his mark
Francisco his mark

THE NATIONAL ARCHIVES
Washington, D. C.

[illegible] NO. 11, [illegible] OF THE UNITED STATES [illegible]
[illegible] between the United States and the
[illegible] Article, signed at Fort Dixon in the Territory
[illegible] June 14, 1[illegible] (Ind. Treaty, Unratified.).

STATE OF NEW MEXICO

Office of the Attorney General

DEPARTMENT OF JUSTICE
P. O. Box 2246
Santa Fe, New Mexico 87501

November 6, 1972

Mr. Ladd S. Gordon
Director
Department of Game & Fish
Villagra Building
Santa Fe, New Mexico 87501

Re: Enforcement of Game Laws on The
Mescalero Apache Reservation

Dear Ladd:

This letter will serve to confirm our telephone conversation last Thursday in regard to the above matter.

Attached you will find a copy of a letter, dated October 10, 1972, written to Nando Mauldin which sets out the current law on this matter. Also attached you will find a copy of the case referred to in the letter, *State v. Warner*, and a copy of Attorney General Opinion No. 6041 dated November 22, 1954 which pertains to this matter also. Furthermore, attached you will find a copy of Public Law 280 (18 U.S.C.A. 1162). As I stated to you, Public Law 280, for a given period of time, allowed states to take over jurisdiction of offenses committed by or against Indians on reservations within their states. New Mexico did not take advantage of this situation and pass the necessary enabling legislation. However, you will note that the New Mexico Supreme Court, in the case of *State v. Warner*, did not deem that it was necessary for New Mexico to enact such legislation in order to have control over criminal offenses committed by non-Indians on Indian country.

If you have any further questions in this regard please do not hesitate to contact me. Also, please keep me posted on the situation with the Mescaleros as it develops.

Very truly yours,

JAMES H. RUSSELL, JR.

Assistant Attorney General

STATE OF NEW MEXICO

Office of the Attorney General

DEPARTMENT OF JUSTICE
P. O. Box 2246
Santa Fe, N. M. 87501

October 10, 1972

Nando Mauldin
New Mexico Department of Game and Fish
Villagra Building
Santa Fe, New Mexico 87501

Re: Enforcement of Game Laws on Indian Lands

Dear Nando:

Please refer to our phone conversation of October 2, 1972 wherein you stated the following facts:

You were informed that there were individuals dove hunting on the Santa Clara and San Ildefonso Indian Pueblos after hunting hours. You stated that you went to one of the Pueblos and parked on the highway right-of-way and observed an individual hunting after hours, and in fact, after the season had closed since it was the last day of the season. You stated that you arrested the individual and charged him. Then, you said that an Indian sheriff from the Pueblo came by and stated that you had no jurisdiction upon their lands and that he told the individual he would be available to testify to this effect when the individual appeared before a Magistrate. You also state that you, as well as many of the Game and Fish Wildlife Conservational officers, have both Federal and BIA commissions. You asked whether or not you were properly acting at the time that you arrested the individual.

I would refer you to the case of *State v. Warner*, 71 N.M. 418, 379 P.2d 66, (a copy of which is attached hereto). In that case New Mexico Supreme Court held that State courts have jurisdiction over non-Indians' criminal offenses committed on

Indian reservations but not against an Indian and not involving Indian property. Therefore, since the wildlife involved was not Indian property and no Indian was involved, you would be within your rights to arrest the individual under the circumstances set out above.

I hope that this answers your question. However, if there is anything further I can do for you in this regard please do not hesitate to contact me.

Very truly yours,

JAMES H. RUSSELL, JR.
Assistant Attorney General

STATE OF NEW MEXICO

Department of Justice

Office of the Attorney General
Santa Fe

January 6, 1958

Mr. Homer C. Pickens
Director of Game and Fish
Santa Fe, New Mexico

Re: Mescalero Deer Hunt

Dear Homer:

This is in response to your office memorandum of January 2 concerning alleged violations of law in regard to the subject deer hunt.

Your file reveals that the violations, if such occurred, were committed by non-Indian employees of the Mescalero Apache Indians. This is to say that our office is in agreement with the conclusion reached in the letter of Mr. William A. Brophy, by Mr. Thomas O. Olson, dated July 8, 1955.

While the case of In Re Blackbird, 109 Fed. 139, held that state authorities have no jurisdiction to enforce the game and fish laws of the State against Indians residing on reservations, the Supreme Court of the United States held in Draper v. U.S., 164 U.S. 240, that state courts have jurisdiction to try and punish offenses against state law committed on Indian reservations by non-Indians at least where no offense against an Indian was committed. Accordingly, it is our view as reflected from your file, which is returned herewith, that non-Indian employees of the Mescalero Apache Tribe who violate New Mexico game laws are subject to prosecution and punishment in the courts of this State.

If you should desire a formal opinion to this effect, we shall be happy to render one prior, of course, to the institution of any lawsuits concerning this matter.

Yours very truly,

/s/ROBERT F. PYATT

Robert F. Pyatt
Assistant Attorney General

TRANSCRIPT OF PROCEEDINGS

August 19, 1977

On motion for preliminary injunction)

THE)URT: The next matter is 77-395, the Mescalero Apache Tı e versus the State of New Mexico. Is the Plaintiff ready?

MR. .OOM: The Plaintiff is ready, Your Honor.

THE)URT: Is the Defendant ready?

MR.] JNIGAN: The Defendants are ready, Your Honor.

THE)URT: We will go ahead, Mr. Bloom?

MR. .OOM: Your Honor, we would call Mr. Wendell Chino, the resident of the Mescalero Tribe, as our first witness.

MR. .OOM: May it please the Court?

THE)URT: Yes, sir.

WENDELL CHINO

was callec ; a witness herein by the Plaintiff, and after having been duly 'orn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR.] OOM:

Q. V ıld you state your name for the record, please?

A. M name is Wendell Chino.

Q. M Chino, where do you reside?

A. I ide on the Mescalero Apache Reservation.

Q. A you an officer with the Mescalero Apache Tribe?

A. Y . sir.

Q. What is your capacity with the Mescalero Apache Tribe?

A. I'm the President of the Mescalero Apache Tribe.

MR. BLOOM: Your Honor, we have agreed with the State to stipulate as to the existence of the Reservation and the boundaries as they exist today.

THE COURT: All right, sir.

MR. BLOOM: In South Central New Mexico.

Q. (By Mr. Bloom) Mr. Chino, does the Tribe live in a separate area apart from the normal and general people of the United States?

A. Yes, sir.

Q. How did this come about?

A. This comes about by the treaty that the Mescalero Apache Tribe has with the United States. And also the Reservation that was established by executive order for the Mescalero Apache Tribe and its members.

Q. I will hand you what is marked as Plaintiff's Exhibit 1 and ask if you can identify this for me, please.

A. This is the treaty between the Tribe and the United States.

Q. This is a printed copy of that treaty?

A. Yes, sir.

Q. Does this spell out the terms between the Mescalero Apache Tribe and the United States Government?

A. Yes.

Q. What was the purpose of that treaty?

A. The treaty is a Peace Treaty between the Mescalero Apache Tribe and the United States, and with certain various stipulations regarding the obligations of the Tribe under the treaty and certain obligations that the United States assumes.

Q. What obligations did the Mescalero Apache Tribe assume?

A. The Mescalero Apache people agreed to be under the exclusive jurisdiction of the United States and its laws.

Q. Now, when was this treaty entered into?

A. In July, 1852, I believe.

MR. BLOOM: Your Honor, I have provided copies of all exhibits to Counsel.

THE COURT: All right, sir.

MR. BLOOM: I move for the admission of Plaintiff's Exhibit 1.

MR. DUNIGAN: May it please the Court, we would object to the admission of the exhibit on the grounds that it is not relevant to this case, certainly not before the Defendants have had an opportunity to answer the Complaint, which is the foundation of this lawsuit, at which time we may very well raise objections to the continuing validity of the treaty and we certainly have disputes with reference to its legal significance in any event.

THE COURT: Fine, it will be admitted.

MR. BLOOM: Plaintiff's Exhibit 2 has been stipulated to as being a map showing the boundaries of the Mescalero Reservation as they exist today.

(Plaintiff's Exhibit 1 was admitted into evidence.)

Q. (By Mr. Bloom) Mr. Chino, does the Mescalero Tribe have its own government?

A. Yes, sir.

Q. Can you tell us how that government was formed?

A. The government of the Mescalero Apache Tribe is separated into three branches; the legislative branch, which is composed of the Mescalero Apache Tribal Council, the executive branch, which consists of my office, the vice-president of

the Tribe, and the secretary and treasurer, who are appointed officers by the Tribal Council, and the Tribal judicial branch.

Q. I will hand you what has been marked as Plaintiff's Exhibit 3 and ask if you will identify this for me, please, sir?

A. This is a copy of the Constitution of the Mescalero Apache Tribe.

Q. Is this the constitution under which the Tribal government is formed and operates today?

A. Yes, sir.

MR. BLOOM: I move for the admission of Plaintiff's Exhibit 3.

MR. DUNIGAN: No objection.

THE COURT: It will be admitted.

(Plaintiff's Exhibit 3 was admitted into evidence.)

Q. (By Mr. Bloom) Mr. Chino, what part does the council and executive branch or the legislative and executive branch of the Tribal government play in hunting and fishing that takes place on the Mescalero Reservation?

A. The legislative branch and the executive branch of the Tribe are responsible to declare hunting season, fishing season, on the Reservation as well as to make surveys and game studies in connection with fishing and hunting.

Q. How long has the Mescalero Tribe been concerned in regard to hunting and fishing on its Reservation?

A. Well, I would say from time in memorial the Tribe has been concerned about the wild game on the Reservation.

Q. And the Tribe, through its government, regulate and control hunting and fishing?

A. Yes, sir.

Q. And how do they do this?

A. By the adoption of various ordinances, which promulgate the date and the bag limits and the areas in which the hunt on the Reservation can take place.

Q. Was such done for the year 1977?

A. Yes, sir.

Q. I would hand you what has been marked as Plaintiff's Exhibit 4, 5, and 6, and ask if you will identify these for us, one at a time?

A. First document is Ordinance Number 77-1.

Q. What is the purpose of this ordinance?

A. It's an ordinance that pertains to the hunting and fishing within the exterior boundaries of the Mescalero Apache Reservation.

Q. And this ordinance establishes season and bag limits that you earlier described?

A. It states specifically that no State license of any kind shall be necessary for any person who has a Tribal Hunting License to hunt on the Reservation.

Q. Does it provide for season dates or bag limits in this ordinance?

A. General ordinance with reference to the regulations and can be established by the council.

Q. All right, what is Plaintiff's Exhibit 5?

A. I beg your pardon?

Q. What is the next exhibit, Plaintiff's Exhibit 5?

A. This is an ordinance, Number 77-2.

Q. What does this ordinance provide for?

A. This ordinance provides the hunting regulations with reference to season, bag limits, and license fees.

Q. On the Reservation?

A. On the Mescalero Apache Reservation.

Q. All right, both of these ordinances, Plaintiff's Exhibit 4 and 5, were they adopted by the Mescalero Tribal Council?

A. Yes.

Q. Were they properly approved by the executive department?

A. Yes, sir.

MR. BLOOM: I move for the admission of Plaintiff's Exhibit 4 and 5.

THE COURT: Any objection?

MR. DUNIGAN: No objection, Your Honor.

THE COURT: They will be admitted.

(Plaintiff's Exhibits 4 and 5 were admitted into evidence.)

Q. (By Mr. Bloom) Would you identify for us Plaintiff's Exhibit 6?

A. This exhibit provides for a package hunt, and it establishes the bag limit for various game animals on the Mescalero Apache Reservation.

Q. This is a two-page exhibit. Would you examine the second page, please, sir?

A. Yes. The second page concerns the hunting permit.

Q. This is the application for a permit, is it not?

A. Right.

Q. One who hunts on the Reservation, they have to make one of these out?

A. Yes, sir.

Q. Anyone who obtains a license or wishes to is given this exhibit?

A. Yes, sir.

MR. BLOOM: I will move for admission of Plaintiff's Exhibit 6 at this time.

THE COURT: Any objection?

MR. DUNIGAN: No objection.

THE COURT: It will be admitted.

(Plaintiff's Exhibit 3 was admitted into evidence.)

Q. (By Mr. Bloom) Why have the Mescalero Apaches been so concerned in terms of regulating hunting and fishing within the confines or within the exterior boundaries of this Reservation?

A. First of all, the Tribal Council is interested in the protection and the preservation of wild game on the Mescalero Apache Reservation.

Q. Just for the purposes of preserving it?

A. No. Because the Mescalero Apache Tribe has come to realize that the preservation of wild game on the Reservation would contribute economically to the well being of the Tribe.

Q. How does this contribution take part? Is it part of an overall program of some sort?

A. The Mescalero Apache Tribe is deeply involved in the promotion and development of tourism on the Reservation, and hunting and fishing is a part of the overall tourism development.

Q. So you have chosen to go into tourism and development?

A. Several times it has come to the attention of the Mescalero Apache Tribal Council and the members of the Tribe that in a matter of a few more years the timber income which was the bulk of the Tribal income would diminish very greatly. And because of this fact, the Tribal Council studied other possible avenues to replace and generate that timber income. And we have decided that we don't have any natural resources, but we do have wild game, and we do have outdoor tourism potential. For this reason, we have gone into hunting and fishing.

Q. All right, sir, do you have any other enterprises involved on the Reservation besides tourism and timber?

A. We have our cattle operation, we have our campgrounds, we have the Inn of the Mountain Gods operation which is a tourist complex.

Q. The Inn and campgrounds are part of the tourism development, are they not?

A. Yes, sir.

Q. Have you done anything else besides construct the campgrounds and the Inn of the Mountain Gods?

A. The Mescalero Apache Tribe also owns and operates the Sierra Blanca ski area.

Q. Are there any natural lakes on the Reservation?

A. The lakes that do exist on the Reservation have been created by the Tribe in cooperation with the Bureau of Indian Affairs.

Q. How many of these lakes have been constructed?

A. I beg your pardon?

Q. How many of these lakes have been constructed?

THE COURT: Been built?

THE WITNESS: Approximately eight.

Q. (By Mr. Bloom) What was the purpose of building these lakes?

A. The purpose of building these lakes is to create the bodies of water so that the bodies of water could be planted with fish on the Reservation.

Q. Do you have many natural streams on the Reservation?

A. No, not too many streams on the Reservation.

Q. You had to create a place for fishing, then?

A. We had to create these lakes where there were springs; so basically, these lakes are fed by springs on the various locations.

Q. How are these aspects now of the tourism project? How do these correlate, or how does hunting and fishing correlate to this overall program of these other items?

A. We believe that hunting and fishing correlates very well with the end of the summer tourist season and before the ski season begins. We fill in the months with hunting and fishing programs.

Q. How about the use of campgrounds, how does that fit in with hunting and fishing?

A. We do provide camping facilities at some of the locations where we have created these lakes to provide not only camping facilities but opportunities for fishing.

Q. How do these things, with the use of the hunting and fishing, how do they benefit the Mescalero Tribe?

A. The Mescalero Apache Tribe in its efforts to develop economically, of course, has two major goals: Number one is to provide employment opportunities for members of the Tribe, and the other is to generate income, income to the Tribe so that we could maintain our Tribal government and in turn provide services to the members of the Tribe.

Q. Now, Mr. Chino, how does the hunting and fishing specifically then provide such assistance to the members of the Tribe and to the Tribal government?

A. Oh, hunting and fishing gives individual members of the Tribe an opportunity to serve as guides, so that our own people could take the hunters out into the various hunting areas.

Q. Who pays these guides?

A. The Tribe. And we are responsible to make arrangements for our people to serve in this capacity.

Q. Do you charge for anyone who wishes to hunt or fish on the Reservation?

A. Yes.

Q. What is done with the money that is generated through charging for such hunting and fishing?

A. It goes into the treasury of the Tribe.

Q. This is after the costs and expenses have been taken from it?

A. Yes, sir.

Q. And how do you obtain the fish that are used in these eight lakes that you have described?

A. The fish?

Q. Where do you get them?

A. We get the fish from the Mescalero National Fish Hatchery that is located on the Reservation.

Q. Is this owned or operated by the Mescalero Tribe?

A. The hatchery is owned by the United States Government.

Q. Who runs the hatchery?

A. The Bureau of Fisheries.

Q. Now, to whom will this fish hatchery, to whom do they provide fish?

A. The Mescalero Apache Tribe has priority on the fish. They are produced at the Mescalero National Fish Hatchery. If there are any surplus fish, then these are distributed to other Indian tribes in the State, and in other states.

Q. This hatchery, then, is for producing and provision of fish only to Indian tribes, is that correct?

A. Yes, sir.

Q. When was this fish hatchery put into operation?

A. About 1965.

Q. Why was the fish hatchery placed on the Mescalero Reservation?

A. After the lakes were created on the Reservation, we found that it was necessary to have fish for these lakes, and we went to work and saw to it that the hatchery was located on our Reservation.

Q. The State of New Mexico, did it employ any assistance in the operation of the fish hatchery?

A. The State of New Mexico does not contribute anything into the production, nor to the operation of the hatchery.

Q. Do they provide any assistance in terms of maintaining the lakes?

A. No, sir.

Q. Mr. Chino, have you had any problems brought about by reason of State enforcement of New Mexico Hunting and Fishing Regulations?

A. Yes, sir.

MR. BLOOM: It's been stipulated we could put into evidence Plaintiff's Exhibit 7 and 8, which are—Exhibit 7 is a regulation, 582 of the New Mexico State Game Commission describing hunting and fishing units. And New Mexico State Game Commission Regulation Number 583, which is the official proclamation of bag limits, seasons for hunting and fishing in 1977 in New Mexico, and 582, also, by the way, is for 1977 only. Additionally, Plaintiff's Exhibit 9, which is a fishing proclamation that was distributed to the public by the State of New Mexico, and Plaintiff's Exhibit 10, which is a big game and hunting proclamation distributed by the State of New Mexico to the general public.

Q. (By Mr. Bloom) Have you had any problems in regard to bag limits and seasons as to State regulation or application of State regulations and laws?

A. Very definitely.

Q. What, for example?

A. Well, first of all, I think that we have a conflict of dates with seasons, and we also have a conflict with bag limits.

Q. Can you tell us of any specific conflict with season dates on the 1977 big game season?

A. I think for the hunt, this fall our hunting dates are several days in advance of the State season. This immediately creates a conflict for someone who may have a desire to hunt on the Mescalero Reservation, and in the event that he does take game on the Reservation and transport it beyond the exterior boundaries of the Reservation; and because of this conflict, I think that while he innocently hunts on the Reservation, he jeopardizes himself by transporting the game beyond the exterior boundaries of the Reservation.

Q. Who makes the decision as to the bag limits and seasons within the Mescalero Reservation?

A. These are determined by the Mescalero Apache Tribal Council.

Q. Do they just arbitrarily do this?

A. No. I think our season and the bag limits are supported by studies carried out by our own Tribal conservation officer, as well as the assistance by the Bureau of Indian Affairs, the various studies that are carried out in connection with wildlife on the Reservation.

Q. Do you employ your own officers to do this?

A. Yes, sir.

Q. Are they in fact employees of the Tribe, then?

A. They are employees of the Mescalero Apache Tribe.

Q. All right, sir, do they render any reports to the council? How does the council select what dates to have and how many or how much bag limit to have?

A. Well, I think that the Tribal Council is interested in the number of head of antelope, the number of head of elk, the number of head of deer, that we have on the Reservation, and their approximate movements on the Reservation, and the increases in these various species of wild game. These are all important to the council before they determine the season and the bag limits.

Q. Where do you believe that there is any interference by the Tribe of the State of New Mexico when it enforces the New Mexico Game and Fish Regulations within the Mescalero Reservation?

A. I think that in addition to the conflict of seasons and the conflict of bag limits, we run into what we consider an interference by the State of New Mexico in the exercise of our Tribal government.

Q. Can you be more specific in how that interference takes place?

A. Well, first of all, I think that we could sell a hunter a permit which in our judgment and in our jurisdiction we consider that to be valid. And say that within this conflict of dates he takes his bag limit, and he wants to remove his game from the Reservation.

Q. How does that interfere with the Tribe's right to govern itself, though, within the Reservation?

A. This would prevent many, many hunters from wanting to hunt on the Mescalero Reservation, which would then result in the loss of revenue to the Mescalero Apache Tribe.

Q. Do you feel that this would affect your operation and management of the tourism program?

A. Yes, sir.

Q. Would this in any manner or way affect your cattle raising, the cattle program, or industry?

A. Yes, sir.

Q. How?

A. Because then we would not be able to balance out Tribal income with the cattle income to maintain a sufficient revenue to maintain our government.

Q. Is there a relationship between raising cattle and maintaining a game management program?

A. Yes, sir.

Q. What is that relationship?

A. The usual utilization of the range.

Q. Utilization of the range, you mean if you are going to use one, you can't use the other?

A. Well, I think that we have to assume and provide management for the cattle operation. And by the same token, we have to provide the same type of a management for the operation of wild game.

Q. How does the State regulations interfere with that?

A. Well, like I say, it would result in severe loss of income.

Q. Now, Mr. Chino, does the Tribe maintain any sort of advertising program or dissemination of information about these hunting and fishing programs?

A. Yes, we do issue public information. A form of brochures, proclamations.

Q. Do you do this every year?

A. Yes, sir.

Q. How many years have you been doing this, if you recall?

A. Several years.

Q. Several years. All right, I will hand you what is marked as Plaintiff's Exhibits 11, 12, 13, 14, and 15, and ask if you can identify those for me, please?

A. One exhibit has to do with the 1972 season. The next one has to do with the season for 1973. The next one has to do with the season for 1974. The next one includes the season for 1975. And the last one here includes the season for 1976.

Q. Now, these brochures, generally, what do these brochures tell people who get them?

A. It tells them that hunting is available on the Reservation and spells out the seasons and the fees, and the areas where hunting can take place.

Q. All right, sir. Did you print one of these for the year 1977?

A. Yes.

Q. You did? All right. And is Plaintiff's Exhibit 6 what you printed for 1977?

A. Yes, sir. The application.

MR. BLOOM: I will move for the admission of Plaintiff's Exhibits 11 through 15.

THE COURT: Any objection?

MR. DUNIGAN: No objection.

THE COURT: They will be admitted.

(Plaintiff's Exhibits 11 through 15, inclusive, were admitted into evidence.)

Q. (By Mr. Bloom) Mr. Chino, if the State of New Mexico is permitted to continue enforcement of its game regulations within the Reservation, how will this harm the Mescalero Tribe?

A. I think that it will injure the reputation of the Mescalero Apache Tribe. I think it would result in loss of income to certain individual members of the Tribe, and would also result in the loss of general income to the Tribe.

Q. Would this affect your tourism program?

A. I am certain that it will.

Q. Can you give us an idea in your opinion as to how this might affect the tourism program?

A. Well, let's take for example the package that we have for hunting. We use the Inn of the Mountain Gods as the center for the operation of the package hunting program. If we continue to experience interference by the State of New Mexico, that alone would result in the decrease of guests at the Inn of the Mountain Gods.

Q. Have you had any problems in the past by reason of State enforcement of hunting and fishing regulations against persons who have hunted on the Reservation or fished on the Reservation?

A. I believe it was last year when two individuals who were given hunting permits by the Tribe took game, and after they left the Reservation with this game finally, finally resulted in some action taken against them by the State of New Mexico.

Q. Did they conform to the Mescalero regulations?

A. Yes, sir. Animals were tagged by the tags provided by the Tribe.

Q. Has this affected the Tribe's operations in any manner or way in terms of harm to your knowledge?

A. I am pretty sure that these two hunters had this one unfortunate experience, have already to some degree warned other hunters and their friends.

MR. DUNIGAN: Objection, Your Honor. I think this is just speculation.

THE COURT: Sustain the objection.

Q. (By Mr. Bloom) Was there any publicity in the news media as to what happened in regard to these two hunters?

A. I think that the action taken against these hunters appeared I believe in one of our county papers.

Q. Mr. Chino, who, specifically, handles the enforcement on the Reservation of the Mescalero Hunting and Fishing Regulations?

A. The Mescalero Apache Tribe and the Bureau of Indian Affairs.

Q. Who specifically from the Tribe does this job of enforcement?

A. The Tribal conservation officer.

Q. Are they employed by the Tribe?

A. They are employed by the Mescalero Apache Tribe.

Q. Have they been trained in this capacity?

A. Yes, sir.

Q. Have they been given any special training in this capacity?

A. Yes. In fact, they are too technical for me.

Q. Now, you stated by the BIA, Bureau of Indian Affairs, are these conservation officers, by whom are they actually employed? Who pays their salaries?

A. When it comes to the officers of the Bureau of Indian Affairs, then the United States Government pays their salary.

Q. How about the Mescalero conservation officers?

A. The Mescalero conservation officers are paid by the Mescalero Apache Tribe.

Q. Do you know of your own knowledge how these officers carry out their duties on the Reservation as Reservation officers?

A. Would you repeat your question?

Q. Do you have knowledge, your own knowledge, of how the Mescalero conservation officers carry out their duties?

A. They carry out their duties, in addition to what I have already mentioned, and that is surveys and studies that they must make with regard to wildlife. But they are also on constant patrol to enforce the hunting and fishing laws of the Tribe.

Q. Do they attempt at any time to enforce the regulations of the State of New Mexico on the Reservation?

A. Would you repeat your question?

Q. Do these officers also enforce the hunting and fishing regulations of the State of New Mexico on the Reservation?

A. No, sir.

Q. Are these part-time employees?

A. No, they are all full-time employees.

Q. The year round?

A. Year round.

MR. BLOOM: Thank you. I will pass the witness.

THE COURT: Mr. Dunigan?

MR. DUNIGAN: May it please the Court?

THE COURT: Go ahead, sir.

CROSS-EXAMINATION

BY MR. DUNIGAN:

Q. Mr. Chino, in the various Tribal publications which you have identified as Plaintiff's Exhibits 11 through 15, I believe you said that this is the information published by the Tribe pertaining to big game hunting for the seasons '72 through '76, is that correct, sir?

A. That is correct.

Q. Isn't it true that in those publications, Mr. Chino, that the Tribe made, gave express notice to the prospective hunter that New Mexico State law or regulations of the State of New Mexico pertained to the hunting and fishing, or at least hunting on those Reservations?

A. I am sorry, I did not catch your first words there?

Q. My question is whether or not the publications to which we have reference contained the recognition and explained to the hunter, give the hunter notice, the prospective hunter notice that the New Mexico State law and regulations of the department pertain to hunting on the Reservation?

A. No.

Q. Well, as an example, Mr. Chino, let me refer you to Plaintiff's Exhibit No. 15, which is the big game hunting information pertaining to the year 1976. And if you will read the paragraph at the bottom of the second page?

A. The entire paragraph?

Q. Yes.

A. "Under a New Mexico State law, the total number of deer which may be taken by any one hunter in one year is two. Therefore, a hunter purchasing both a whitetail permit and mule deer permit could take one whitetail buck and one mule deer of either sex or one mule deer buck and one mule deer doe. He could not legally take a total of three deer."

Q. Isn't that statement a recognition on the part of the Mescalero Apache Tribe that State law is applicable on the Reservation, at least as it pertains to big game hunting?

A. No.

Q. Why was the statement in the exhibit?

MR. BLOOM: Your Honor, I have to object. I think this is a legal conclusion. It's going to have to be drawn by the Court, based upon the fact that whatever language is there speaks for itself. And as to why it was put in, I think he can go into that, but for asking about conclusions about whether it conforms or not is something else.

THE COURT: He can inquire as to the witness's knowledge.

Q. (By Mr. Dunigan) Why was this statement in the exhibit?

A. I think the controlling factor there is the preservation.

Q. Pardon?

A. Preservation of game.

Q. But it does give notice, does it not, to the reader that he will be expected to comply with the laws of the State of New Mexico?

MR. BLOOM: I am going to object, Your Honor. The language speaks for itself.

THE COURT: Right.

Q. (By Mr. Bloom) With reference to the same exhibit, Mr. Chino, I ask you to read from that exhibit a sentence located within the exhibit, which would be the next to the last page. Could you please read that paragraph?

A. "A staff of well-trained Tribal conservation officers will assist hunters. All New Mexico hunting regulations apply. There will be additional restrictions on calibers and bullet weights for elk hunting. Additional information may be obtained by contacting the Hunt Manager, Mescalero Tribe, Mescalero, New Mexico, 88340. Phone 505 671-4495."

Q. To your knowledge, Mr. Chino, do the other exhibits which you have identified pertaining to hunting on the Mescalero Reservation from 1970 to 1972 through 1975 also contain the statement that all New Mexico hunting regulations apply?

A. I believe so. But I would like to state that any references made to the State of New Mexico are done as a matter of accommodating in our efforts to cooperate with the State.

Q. Fine, for whatever reason that the Tribe may have in giving that information out, the prospective hunter coming to the Reservation to hunt is advised that the regulations of New Mexico pertaining to hunting apply?

A. It applies to the extent of good hunting principles, that is the purpose of these references.

Q. The references are however—

A. Not as to the application, the enforcement of New Mexico law.

Q. The statement itself, as you have read it, is all New Mexico regulations apply, is that correct?

A. That's the way it reads.

Q. Mr. Chino, you mentioned in your testimony that one of the reasons regulation of hunting and fishing on the Reservation by the State of New Mexico creates problems for the Tribe, was that in 1977, for example, there was a conflict in the season date? Is that correct?

A. Yes, sir.

Q. For what hunting season is there a conflict?

A. I think in the antelope season, our season opens earlier than that of the State.

Q. Your season opens on what date?

A. Pardon?

Q. On what date does your season open?

A. I think the latter part of August. And the State season opens in September.

Q. The difference is a matter of days?

A. Yes. But that's crucial to—

Q. Why is it crucial? What is the significance of that? Or is it significant?

A. That from a standpoint of enforcement, I think that we, as a Mescalero Apache Tribe, believe that we are issuing, a hunter who comes on our Reservation purchases a license to hunt, is hunting in good faith.

Q. But what significance does it have with respect to—

A. And by reason of the conflicts he may very well be picked up by the State, a State game enforcement officer.

Q. That is an after-the-fact situation, Mr. Chino. I'm asking why the Tribal Council chose August 29th as the date for the season to begin as opposed to the September date that the State Game Department had chosen?

A. Well, I think that the establishment of the hunting dates on the Reservation comes in the purview of the Mescalero Apache Tribe. Therefore, it has a responsibility to establish the season.

Q. Whether or not that is the case, why was the particular date chosen? Does it have some significance?

A. I am pretty sure that these dates could very well be supported by studies that are carried out by our conversation

Q. Q. On what date was the hunting season for antelope established on the Reservation by the council?

A. I don't recall.

MR. BLOOM: May it please the Court, the regulations setting the date and what have you are in evidence at this time.

Q. (By Mr. Dunigan) Mr. Chino, I refer you to Plaintiff's Exhibit No. 5, which is the Mescalero Apache Ordinance, which I believe you testified established the hunting seasons on the Reservation, and embodies the Mescalero Apache hunting and fishing proclamation? I would like to ask if you from that document can discern on what date it was adopted by the Tribal Council?

A. Adopted on June 17th, 1977.

Q. Thank you. At that time, Mr. Chino, to your knowledge, did the Tribal Council know or was the Tribal Council aware of the antelope season that had been established by the Department of Game and Fish to the State of New Mexico for areas within the State?

A. I believe not.

Q. Was the difference of a matter of a few days in those dates established merely for the purpose of establishing a foundation for this lawsuit?

A. No, sir.

Q. If there is a significance between the date in which the antelope season begins on the Mescalero Apache Reservation, and the date established by the Department of Game and Fish, you are not able to testify as to what it is, is that correct?

A. Could you repeat your question?

Q. If there is a significance between the difference in dates on which the antelope season begins on the Reservation and in the rest of New Mexico, you are not able to explain to the Court what the significance of the difference is, is that right?

A. Well, the difference, the significance that I can think of is that it could do a great harm on the Mescalero Apache Tribe.

Q. Okay.

A. By the difference in dates.

Q. How will that cause harm to the Tribe?

A. Because the dates do conflict, as I've already testified. And there would be hunters who would hesitate, that they would be hesitant to hunt on the Mescalero Apache Reservation knowing that they could be subject to prosecution by the State of New Mexico.

Q. To your knowledge, have there to your knowledge been any hunters who have expressed an interest in hunting between August 29th and September 3rd and have been deterred on the Reservation and have been deterred from doing so because of the conflict?

A. Not to my personal knowledge.

Q. You are just assuming that that might be the case?

A. Yes, sir. But it's not only an assumption but, like I said, this hunting incident last year, I think validates my assumption.

Q. Well, you know of no instance at least with reference to this year in which a hunter has been deterred from hunting on the Reservation?

MR. BLOOM: I am going to object. There aren't any hunting seasons open and won't be; the State's, by proclamation, is September 1st; the Tribe, August 29.

THE COURT: Fine, he may answer.

Q. (By Mr. Dunigan) To your knowledge, has there been any occasion in which a prospective hunter has been deterred in his interest in hunting on the Mescalero Apache Reservation by the fact that he might be thereafter arrested and prosecuted by the State of New Mexico for hunting out of season?

A. Not to my personal understanding. Not to my personal knowledge.

Q. Now, Mr. Chino, do you know the number of licenses that have been authorized by the Mescalero Apache Tribe for hunting for the 1977 season of elk?

A. I don't recall specifically.

Q. Do you know how many have been authorized for deer?

A. I don't recall.

Q. How about antelope?

A. I don't recall either.

Q. Isn't it a fact, Mr. Chino, that for the 1977 season all of the licenses that have been authorized by the Tribe for elk have been sold?

A. That is my understanding.

Q. Isn't the same true for deer?

A. I cannot—not to my knowledge.

Q. How about antelope?

A. I do not know.

Q. Do you know whether there is a waiting list for any of these hunts?

A. Well, I know in previous package hunts and other hunts, we have more demands than we can meet. Perhaps I should amplify on that statement by reason of our proclamation.

Q. Well, let me ask you, Mr. Chino, do you know of any instance in which any hunter who has expressed an interest to hunt on the Mescalero Reservation has been dissuaded or deterred from doing so because of fear that he will be prosecuted by the State of New Mexico if he violates any of the laws or regulations of the State pertaining to hunting or fishing?

A. Not to my personal knowledge.

Q. And as a matter of fact, the Tribe has no objection if a hunter purchases a State license so long as he meets your requirements as well, is that right?

A. That's a matter for the hunter to determine.

Q. The Tribe will not deny him access to the Reservation if he has a State license so long as he meets your requirements?

A. As long as he complies with and he meets the hunting regulations of the Tribe.

Q. So whether he buys a license or not from the State is up to him, the individual hunter?

A. That is correct. But that does not give him an entry to hunt on our Reservation.

Q. With reference, again, Mr. Chino, to Plaintiff's Exhibit No. 5, which is the ordinance of the Tribe establishing the or embodying the hunting and fishing proclamation for 1977, doesn't, in the proclamation, it alert the prospective hunters to a controversy existing between the Tribe and the State with reference to whether or not State laws apply and whether a State license is required for hunting on the Reservation?

A. I don't recall.

Q. Well, let me refer you, then, to the exhibit, Exhibit 5, and ask you if you will read the last paragraph on Page 6, which is highlighted by the phrase, "Note" and then a colon, and the rest of the language is in all capital letters. Would you read that, please?

A. "The State of New Mexico and the Mescalero Apache Tribe are presently involved in a controversy regarding the issue of whether or not a New Mexico hunting or fishing license is required of a non-Indian in order to hunt or fish on the Mescalero Reservation. The Tribe maintains that no State license is necessary, but accept no responsibilty for any consequences which may be suffered by reason of failure to obtain a State license. Current information regarding this controversy is available in Tribal Offices, Mescalero, New Mexico, 88340.

Q. Fine. Thank you. Now, Mr. Chino, you testified that in your judgment that unless the State is enjoined as requested in the Complaint, that the Tribe will suffer a loss of reputation. What do you mean by that? Could you be more specific about how it would suffer in that regard?

A. I think that the Tribal Council acts in good faith when it promotes and approves hunting on the Mescalero Apache Reservation. And this information then becomes available to the public. And once this information becomes public, then the integrity of the Tribe is then placed on the line. And we do intend to conduct and to allow hunting on the Reservation. And if in the event that we could not do so, then we have created some questions regarding the integrity of the Tribe.

Q. You mean the public could not place reliance on the statements made by the Tribe in that case?

A. Yes, sir.

Q. Well, Mr. Chino, all of the information that is published by the Tribe with reference to this, and you have identified many examples of it, including the 1977 proclamation, gives notice to any prospective hunter, does it not?

MR. BLOOM: Objection. It's totally misleading, what was discussed was only the 1976 or '75 and prior brochures. He has not gone into the 1977 brochure.

MR. DUNIGAN: May it please the Court, the statement recently read by the witness was from the 1977 proclamation concerning the controversy existing between the State and the Tribe alerting any prospective hunter to the fact of the controversy, indicating the Tribe would not take responsibility if the hunter got in trouble with the State.

MR. BLOOM: Having a State license is not the controversy. It isn't going to create or cure the controversy. The controversy here is enforcement here of the State of New Mexico with who hunt on the Reservation.

THE COURT: Go ahead, Mr. Dunigan.

Q. (By Mr. Dunigan) Mr. Chino, how will the reputation of the Tribe be hurt in the regard in which you have stated, when in fact the information sent out to hunters gives notice of the possibility that the hunter will get in trouble with the State if he doesn't have a State license?

MR. BLOOM: I object, Your Honor. It doesn't say that. It says that there is a controversy.

THE COURT: Fine. He may answer the question.

A. How will it?

Q. Yes, how will the reputation of the Tribe suffer when it's warned the people with which it does business that there is a possibility of difficulty?

A. We are relying only to the extent that we are to issue our license or permit if he wishes to hunt on our Reservation.

Q. Right, but if he wants to do that, the information that you have supplied warns him that there could be trouble and puts any risk of difficulty on the hunter, doesn't it?

A. That is true.

Q. Didn't you say earlier in your testimony that as far as the Tribe is concerned it's entirely up to the prospective hunter with respect to whether or not he gets a State license? As long as he meets your requirements as well?

A. Yes.

Q. So then you really can't explain how the reputation of the Tribe would be injured then if the injunction is not entered prior to the litigation of this suit on the merits?

A. I think that one may take the position that the Tribe on one hand issues him the license, and supposing that he is prosecuted by the State, then having already secured it in good faith, he relies on the Tribe, then he finds himself in jeopardy. Then he can no longer have that complete confidence in the Tribe, in the validity of a Tribal hunting license.

Q. How can he blame you for that when you have given him notice of the very fact he may get in trouble with the State? He got himself in that hot water, didn't he? How can he blame you? Why would it hurt your reputation?

A. By offering him, offering him a license which we believe to be within the proper exercise of the Tribe to do so.

Q. Between now and the time this case may be finally litigated on the merits, how much income will be lost to individual members of the Tribe? You stated that it was your judgment—

A. I would say a sizable amount.

Q. How much?

A. 10,000, 20,000.

Q. What do you base that on?

A. That's on the individual members of the Tribe.

Q. Each?

A. No, I am not speaking collectively of all the members of the Tribe, but to those members who serve as guides.

Q. You are not suggesting that each Tribal member who serves as a guide would be out ten to twenty thousand dollars a piece, or are you?

A. Whatever number of Tribal guides would require to take care of the hunters from outside of the Reservation.

Q. What do you base the figure 10,000 or 20,000 on?

A. On the prospective number of licenses that could be issued.

Q. But you said you didn't know how many licenses have been authorized?

A. Well, I think that I reserved some judgment to estimate the possible number that could be issued.

Q. Well, do you know how many have been authorized for '77?

A. No, I don't recall exactly.

Q. So you really don't have any basis in your testimony now that the loss to Tribal members individually would be ten to twenty thousand?

A. Well, to individual members and it could run as high as a hundred thousand to members of the Tribe to support and maintain their Tribal government. Then it begins to affect each individual member.

Q. On what do you base the figure, a hundred thousand dollars?

A. I am just speaking of the anticipated revenue from whatever number of licenses that the Tribal Council has approved.

Q. You're estimating, did you say?

A. Yes.

Q. Well, on what basis do you make that statement, if you don't know the number of licenses you are talking about?

A. Well, I am speaking of an approximation, like I said, I think I reserved some judgment on it.

Q. Aren't you approximating out of the air?

A. Pardon?

Q. Aren't you approximating out of the air, if you have no foundation for the statements?

A. Well, perhaps I am somewhat guided by some previous years' experience.

Q. Now, that figure, assuming it's reliable, of a hundred thousand dollars, that's for the entire hunting and fishing program for the year, isn't it?

A. This is for the hunting alone, I believe, that I am speaking of.

Q. Well, the Complaint which was filed in this cause, Mr. Chino, indicated that the Apache Tribe and its members derive substantial economic benefit from persons hunting and fishing on the Reservation. In 1976 such benefits were in excess of a

hundred thousand dollars. So that would seem to suggest, and it was pled in this case, it was alleged that a hundred thousand dollars was the figure, the economic figure for the entire '76 season for hunting and fishing and both for Tribal income and income going to individual members of the Tribe, is that correct?

MR. BLOOM: I have to object, Your Honor. The pleadings speak for themselves. We say there was an income in excess of a hundred thousand dollars in 1976, and that was all that was said. No other implications or ramifications other than what was said in the pleadings.

MR. DUNIGAN: Your Honor, Mr. Chino verified this Complaint, and I am simply seeking from him an indication of what it is the Tribe is alleging.

THE COURT: Fine, I think the allegation is there, Mr. Dunigan.

MR. DUNIGAN: Fine, Your Honor.

Q. (By Mr. Dunigan) And is it your testimony now, Mr. Chino, that this hundred thousand dollar figure relates only to income from hunting, and that there will be additional income from fishing?

A. It could vary.

Q. Pardon?

A. It varies.

MR. BLOOM: May it please the Court, we have alleged that it's in excess of, we have not put it down to a specific one hundred thousand dollars for 1976. This thing is getting to be nothing but argumentative over what is alleged in the Complaint.

MR. DUNIGAN: My question had no reference to the Complaint. And it's reference to 1976, Your Honor, I was having reference to prior testimony of this witness who estimated that the Tribe may suffer a loss of income of a hundred thousand dollars if the State is not enjoined.

THE COURT: Fine. That's the allegation.

Q. (By Mr. Dunigan) Now, Mr. Chino, you have indicated in your testimony that all of the licenses that have been authorized for elk have been sold? Is that your impression that all have been sold for deer, and that you didn't know what the situation was with respect to antelope? Now, if those are the facts for that, for the present time, how is the Tribe going to suffer any loss of income at all if this injunction is not entered?

A. I testified to I only understand that the elk permits were sold out, that I do not have personal knowledge and information regarding the other game animals.

Q. Well then, at least with respect to the elk hunt, there can be no loss of income if an injunction is not entered, is that correct?

A. Would you repeat your question?

Q. At least with respect to the elk hunt scheduled for the Reservation in '77, there will be no loss of income if the Court refuses to grant a preliminary injunction?

A. If the Court refuses?

Q. Yes. Because they have already been sold out? Is that right?

A. That would be the case.

Q. What is the cost of a Tribal elk license?

A. I don't recall.

Q. Mr. Chino, I show you what has been marked as Plaintiff's Exhibit No. 6 and ask you if you again would describe what that is.

A. The information concerning a package hunt which includes the application for the hunt as well.

Q. How does a package hunt differ from any other kind of a hunt?

A. Any other hunt?

Q. Yes.

A. I think that this includes the lodging, meals, the person to be available to the hunter.

Q. With reference to the exhibit, Mr. Chino, would you indicate how many permits have been authorized by the Tribe for antelope package hunts for the period of August 29th through September 2nd, '77?

A. You want me to indicate the —

Q. The number of permits that are authorized.

A. Ten.

Q. And the price?

A. 500.

MR. BLOOM: Your Honor, the exhibit will speak for itself.

THE COURT: It does.

MR. DUNIGAN: Well, certainly, the exhibit speaks for itself. I'm simply exhibiting from, or requesting the witness to highlight that information for the Court from the exhibit.

THE COURT: I don't believe there's any need to, Mr. Dunigan, unless you have something that you have a problem of interpreting.

MR. DUNIGAN: Fine, Your Honor.

Q. (By Mr. Dunigan) Mr. Chino, do you know whether or not all of those ten permits have been sold?

A. Not to my knowledge. I would like to state that as the chief executive officer of the Tribe, I have a staff who are concerned with these figures, amounts, detailed information. And in addition to that, of course, I travel a great deal, and I just cannot have all of this detailed information at my fingertips.

MR. BLOOM: Your Honor, we have a witness here who can cover these detailed areas, if that's what Mr. Dunigan is getting to.

THE COURT: All right, sir.

Q. (By Mr. Dunigan) Mr. Chino, let me ask you this. With reference to Exhibit No. 6, does the $500 indicated simply

refer to the license fee or is that the total cost of the entire package hunt?

A. That's the way it is presented.

Q. As what?

A. As a package.

Q. That would be the entire cost of the hunt and the license?

A. As advertised, shown by the exhibit.

MR. DUNIGAN: I have no further questions, Your Honor.

THE COURT: Any rebuttal?

MR. BLOOM: Very short, Your Honor.

REDIRECT EXAMINATION

BY MR. BLOOM:

Q. Mr. Chino, when did the Mescalero government decide that the New Mexico Game and Fish Regulations were no longer going to be enforced and applied within the Mescalero Reservation?

A. The Tribal Council believes that hunting and fishing on the Mescalero Reservation is in the purview, the jurisdiction of the Mescalero Apache Tribe, and that no other laws shall govern or pertain to hunting and fishing on the Reservation.

Q. It goes back to the Tribe's view of its own sovereignty and power?

A. Yes, sir.

Q. At the time that the State of New Mexico established its game seasons for antelope, did they contact the Mescalero Tribe about what the Tribe's wishes might be within the Reservation?

A. Not to my knowledge.

Q. What was the purpose, really, of putting this note on the 1977 application for hunters and in the regulation, this note that appears in Plaintiff's Exhibit 5 at the end, what was the reason for putting that into that proclamation and ordinance?

A. To let the hunter know that as far as the Mescalero Apache Tribe is concerned, that—

Q. Basically, you were just trying to be fair with the hunter, were you not?

A. Yes, sir.

Q. Is the injury from any arrest this year going to occur this year or next year or the year after? When are you going to have the damage from such arrests?

A. I think that at the time the arrest occurs.

Q. A hunter arrested this year has already bought his license, will he be back next year?

A. Probably not.

MR. DUNIGAN: Objection.

THE COURT: Sustain the objection.

MR. BLOOM: I will pass the witness, Your Honor.

THE COURT: Let's take a recess until 3:25.

(Recess taken.)

THE COURT: Please be seated.

MR. GOTTSCHALK: Your Honor, I will need to get Mr. Bloom.

THE COURT: Go ahead. Yes, sir.

MR. BLOOM: Your Honor, we will call Mr. Robert H. Bradley. We are calling him out of order, but he has to get on back to Alamogordo.

THE COURT: All right. That is fine.

ROBERT H. BRADLEY

was called as a witness herein by the Plaintiff, and after having been duly sworn, testified upon his oath as follows, to-wit:

MR. DUNIGAN: No further questions.

THE COURT: Rebuttal?

MR. BLOOM: I have nothing further, Your Honor.

THE COURT: You may step down.

MR. BLOOM: May this witness be excused?

THE COURT: If there is no objection, he may be.

MR. DUNIGAN: No objection.

THE COURT: All right.

MR. FETTINGER: We call Mr. Richard Wardlaw, Your Honor.

RICHARD A. WARDLAW

was called as a witness herein by the Plaintiff, and after having been duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. FETTINGER:

Q. Mr. Wardlaw, are you employed by the Mescalero Apache Tribe?

A. I am.

Q. Are you the administrative assistant to the president of the Mescalero Apache Tribe?

A. I am.

Q. In that capacity, do you generally have supervisory capacity over the records of the Mescalero Apache Tribe in hunting, fishing, and in generally all other matters?

A. I do.

Q. And how long have you been so employed?

A. Oh, approximately 16 years.

Q. You are generally familiar with the testimony given here this afternoon by Mr. Chino regarding hunting and fishing, and you heard the questions generally asked concerning the income of the Tribe in that area. Do you have with you instruments from which you can tell us what the income of the Mescalero Apache Tribe was from hunting, from fishing, and the sale of licenses, of that nature, and indirectly from hunting and fishing activities on the Reservation?

A. I do.

Q. Would you tell us for the year 1976, which I believe is the last year for which we have records, what the income of the Mescalero Apache Tribe was from this subject area?

A. The income of the Mescalero Apache Tribe from fishing for the year 1976, now this is the, I am going to qualify this, this is the fiscal year, ended June 30th, and our hunting and fishing permit sales lap over that fiscal year.

Q. You say that is true for the prior year as well?

A. That would be true for the prior year. That would be true for all of the figures that I give, they're June 30th totals, so any errors that are existing in the fiscal year ending June 30th, 1977 would be simply the same, compensated for rather by the prior year, compensated for by the following or preceding years.

Q. Fine.

A. 1976 fishing amounted to about $51,000 worth of permits. This is fishing, picnicking, and overnight camping at the recreation areas of the Tribe. The direct license revenue which comes to the Tribe was $92,596, or a total of a hundred and forty-four thousand of direct revenue to the general treasury of the Tribe. Now, that does not include in 1976, for example, that portion of the package hunt or package hunts, which went to the Inn of the Mountain Gods. In 1976 we have, he had 125 package deer hunts which $350 of a $550 fee went

to the Inn for room, for lodging, for food, for guide services, and other auxiliary services provided by the Inn to the hunter. On the elk hunts, we were authorized, the council authorized 50 bulls and 50 cows. These were package hunts only. $1400 for a bull package, $800 for a cow package. Of that, $400 went to the Inn and a thousand dollars went to the Tribe on the bulls. And $400 to the Inn and $400 to the Tribe on the cow package. Now, that, for 1976, if you go through and project, and we were so allowed in 1976 to go through and project the income in the brochure, it amounted to approximately $206,000.

Q. Is that total income from hunting and fishing activities on the Reservation including the income of the Inn of the Mountain Gods?

A. That would be the total direct income. There is ancillary income which would come in the form of wives, children, non-hunters, who also come to the Inn with the hunter. The council, a number of years ago, made the decision that the—well, Mr. Chino has testified to this—that the thing that we have to do is to find some other source, some sort of income other than timber income generating income for the operation of the Tribe, Tribal government, and to employ, employment for the people. At the time that they did this, they made a commitment as far as hunting was concerned, and some of the first public hunts held on the Reservation were held at that time, or were done at that time. It gradually built up, it is not a small source of income now. We expect it to become larger, but even more importantly, it is an attraction to bring, we refer to them as "guests" to the Reservation to enjoy the hunting that we have here. Then to use the other facilities, the Inn, the recreation areas, the fishing areas, that we have there. This generates additional income and additional employment for our people.

Q. Is the hunting and fishing program really an integrated part of the recreation development program?

A. Yes.

Q. Is the Inn operated by the Mescalero Apache Tribe?

A. Entirely.

Q. Are 50 percent or more of the people of the Inn of the Mountain Gods also members of the Tribe?

A. Yes, sir.

Q. Are all the conservation officers members of the Tribe?

A. Yes, they are.

Q. Could you tell me if the Tribal Council in fact makes a conscious decision each year as to the hunting season that will be established on the Reservation?

A. From the time that I have been there, the Tribal Council has prepared a hunting proclamation each year establishing seasons, establishing bag limits, and establishing the fees to be charged.

Q. Does the Tribal Council also decide how money will be spent that is earned from the hunting and fishing activities on the Reservation?

A. As I said, the licensing fees, that portion which would be classed as licensing fees, goes back into the general treasury of the Tribe and is appropriated by the Tribal Council each year.

Q. Is that a governmental decision?

A. Yes.

Q. Is it a governmental decision of the Tribe to establish the bag limits?

A. Yes.

Q. At a council meeting?

A. Yes.

Q. Is the resolution or ordinance form kept as a regular part of the permanent record of the Tribe?

A. It is a part of the permanent records of the Tribe.

Q. If it is an ordinance of the Mescalero Apache Tribe, is it submitted to the Secretary of Interior's duly authorized representative for approval?

A. All are routinely submitted.

Q. The Mescaleros have a conscious program to develop goodwill with its neighbors and customers that patronize the facilities on the Reservation?

A. Yes. Hunting and fishing by itself, we prepare a brochure which advertises hunting and fishing. Hunting and fishing is integrated into the advertising programs of the Inn. It is routinely—I think it is routinely mentioned in the advertisements of Sierra Blanca Ski Enterprise as well.

Q. We have a broad-based program of informing the public of what is available on the Reservation?

A. We do.

Q. Has the Tribe established any policy in regard to making refunds in connection with the package tours or hunting and fishing licenses that have previously been issued on the Reservation?

A. The permits and all the information is that no cancellations, no refunds. However, in several instances a hunter has broken a leg, if we can resell the permit, if there is, in fact, a waiting list, we can resell the permit, we will refund the money to him.

Q. What is the reason for that?

A. We have refunded—

Q. What is the reason for establishing that policy, if you know?

A. To encourage the gentlemen to go back. When we had one that had a broken leg, we had another where there had been a death in the family.

Q. Goodwill?

A. Goodwill.

Q. You have heard the testimony regarding Mr. Shaw and Mr. Oliver. And I believe they are the gentlemen that were cited for game practices, or having in their possession game taken on the Reservation. Did Mr. Shaw or Mr. Oliver, either one of them, apply for a hunting license on the Mescalero Reservation this year?

A. I do not believe so.

Q. Historically, has the employment rate on the Mescalero reservation improved over the last few years?

A. Significantly.

Q. Is that improvement due largely to the increased number of people employed by the Tribe in its own activities?

A. Very definitely.

Q. Prior to 1977, if you know, how many times did Mr. Shaw or Mr. Oliver have hunting licenses on the Reservation? It's my understanding when that was discussed that there have been two, they had a license in 1976 and a license in 1975.

MR. DUNIGAN: Objection, Your Honor. It would appear from the testimony of the witness that he has no first-hand knowledge of the duties of which he has been asked to testify.

THE COURT: You may inquire further, Mr. Fettinger, and see what the source of his information is.

Q. (By Mr. Fettinger) Mr. Wardlaw, upon what information is your prior answer based?

A. Telephone conversations with Mr. Shaw, Mr. Oliver, subsequent investigation to try to determine what happened, why this happened, and see if we could be of assistance in the spirit of goodwill.

Q. In that same spirit of goodwill, have we, to your knowledge, has the Mescalero Apache Tribe attempted to cooperate with the State of New Mexico in prior years in connection with hunting and fishing?

A. We attempted to. We have, as I said, we look at the hunters and the others that use our facilities as guests. We have to keep, we have to keep the, a good image before them. Mr. Chino testified that the integrity of the Tribe is at stake. The integrity translates into goodwill. If we say something, if we promise something, if the Tribal Council issues a proclamation that says we will have hunting on such and such a day, we feel it's up to the Tribe to give those people unimpeded good hunting during that period of time.

Q. To your knowledge, was there any conscious effort on the part of the Mescalero Apache Tribal Council, or did it come to their attention that the State of New Mexico had a conflicting antelope season proposed?

A. I don't think it was even considered.

Q. To your knowledge, how did the, upon what information was the council decision based?

A. The council's decision on seasons, bag limits, or seasons and the bag limits are based on recommendations by the conservation officers prepared following their annual game counts and surveys. And these are, these recommendations are prepared in cooperation with the Bureau of Indian Affairs. And the Range Conservation Department.

Q. They are all conservation officers employed by the Tribe, full-time officers-employees? How many full-time employees do we have working as conservation officers year round?

A. Seven full time.

Q. How many part-time do we have during the hunting season to assist the hunters, hunters coming on to the Reservation?

A. I don't have accurate records on the part-time employees.

Q. Can you give the Court any idea?

A. Ordinarily, 15 or 20.

Q. Additional people, part-time?

A. Yes.

Q. They are used exclusively in connection with the hunting and fishing on the Reservation?

A. Just the hunting. There are additional people, approximately ten or twelve, that are employed during the fishing season, at the various recreation areas where fishing is permitted on the Reservation.

Q. How long has the Inn of the Mountain Gods been open?

A. Oh, two years, more or less.

Q. Has the Inn of the Mountain Gods' business generally increased as it was in business longer?

A. Yes.

Q. Is that consistent with the projections that were made at the time, projections that were made, and the representations made on the various financing agencies at the time that the Inn was first conceived?

A. It is.

MR. FETTINGER: I have no further questions, Your Honor.

THE COURT: Mr. Dunigan?

CROSS-EXAMINATION

BY MR. DUNIGAN:

Q. Mr. Wardlaw, are you a member of the Mescalero Apache Tribe?

A. I am not.

Q. Are you a member of any tribe of Indian?

A. Probably your tribe.

Q. You are a non-Indian?

A. I am a non-Indian.

Q. And you have been an employee of the Mescalero Apache Tribe for the last 16 years?

A. Yes, sir.

Q. Have you ever hunted on the Mescalero Apache Reservation?

A. I have.

Q. On those occasions, did you purchase a license issued by the Mescalero Apache Tribe?

MR. FETTINGER: Objection, Your Honor. The individual purchasing a hunting license has nothing to do with the issues of this case. I think it is totally—

THE COURT: Sustain the objection.

Q. (By Mr. Dunigan) Mr. Wardlaw, the total direct income figure that you cited, and I believe it was $206,000 or thereabouts, to what period does that figure relate?

A. $206,000, if you go through and project from our brochure for 1976, and we have sold out in 1976.

Q. '77 you mean?

A. 1976 were the figures I gave.

Q. Okay, the 206?

A. The 206 relates to 1976 hunting season. If you go through and project the bag limits and fees, this, I believe from my rapid calculations, would amount to $206,000.

Q. For the 1976 season?

A. For the 1976 season.

Q. Now, has the '76 season come to an end?

A. The 1976 season would have begun, would have begun the date stated in the 1976 brochure. We are into the 1977 season now.

Q. Do you have any projections with reference to the 1977 season?

A. All I have on the 1977 season is the income received to date.

Q. What is that?

A. $82,415 for hunting, $49,073 for fishing, and a 131,488 total.

Q. For the 1977 season, how many permits to hunt antelope on the Reservation had been sold?

A. To my knowledge, five. I do not handle that directly. That's hearsay.

Q. Do you have any knowledge of what percentage or what number of permits to hunt deer have been sold?

A. I think the deer are sold out. I think the elk are sold out.

Q. And if your knowledge with reference to the antelope is correct, that would be, constitute one-half of the antelope limits, is that correct?

A. That is correct.

Q. Mr. Wardlaw, you were asked whether the Tribe had attempted in the past to cooperate with the State Department of Game and Fish, and I believe your answer was in the affirmative?

A. It was.

Q. With refererence to those requests, did the department ever on any occasion refuse to be of assistance to the Tribe, to your knowledge?

A. I say we attempted to cooperate, and that, I think, is the reason that the notation was in the brochures, that again in this 1977 proclamation. We don't know what the situation is. If you invite a guest into your home, and you don't know what is in an open bottle, you must warn him that you don't know what the contents might do.

Q. You wanted to put the prospective hunter on notice as to what the circumstances may be?

A. This is right.

Q. Mr. Wardlaw, do you have any knowledge of how conflicts in the past with reference to season dates or bag limits between the Mescalero Tribe and the department may have been resolved?

A. Pardon?

Q. In the past, to your knowledge, have there been any conflicts between the Tribe's hunting and fishing proclamation in terms of bag limits and dates and the Department of Game and Fish of the State of New Mexico?

A. The Tribal Council will ordinarily or does in fact prepare their hunting proclamation. This does not necessarily coincide with the proclamations of the State of New Mexico and on several occasions we have had to go to the State and request them to bring their proclamations in to conformity or to modify their proclamation to take care of what the Tribal Council has done, feeling that it has the right to do it. Again, to try to protect the guests that come on to the Reservation, maintain and preserve the goodwill of the hunters.

Q. Was that request made for 1977 to your knowledge?

A. It was not, to my knowledge.

Q. It was made in prior years?

A. I think, one occasion.

Q. On at least that one, did the department adjust its season dates to accommodate the Tribe?

A. It did.

Q. Do you know of any case in which any prospective hunter has been, for the 1977 season, has been dissuaded or deterred from hunting on the Mescalero Reservation because of the requirement of the State License or the threat of difficulty with the State?

A. Not of my own knowledge.

MR. DUNIGAN: No further questions, Your Honor.

THE COURT: Rebuttal?

REDIRECT EXAMINATION

BY MR. FETTINGER:

Q. Mr. Wardlaw, are you familiar with the hunting season for antelope on the Reservation?

A. Yes, I am.

Q. Are you familiar with the season for hunting antelope under the law of the State of New Mexico?

A. I am not.

Q. Are you aware that there is a conflict between the seasons?

A. I've heard that there is a conflict today.

Q. And you testified, I believe, that the deer and elk are sold out?

A. They are.

Q. And that the antelope have five, you've sold five permits on antelope?

A. This is what I understand now.

Q. And the conflict in season is in the antelope season between the State and Tribe, is that correct?

A. Yes, sir.

MR. FETTINGER: No further questions, Your Honor.

THE COURT: You may step down.

MR. BLOOM: We call Mr. Butch Blazer.

ARTHUR BUTCH BLAZER

was called as a witness herein by the Plaintiff, and after having been duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. BLOOM:

Q. Would you state your name for the record, please?

A. My real name is Arthur L. Blazer. My nickname is Butch.

Q. And what is your connection with the Mescalero Apache Tribe?

A. I am with the Range Conservation, for the Bureau of Indian Affairs, and I work in conjunction with the Mescalero conservation officer in making recommendations to the Tribal Council.

Q. What specifically do you do, what do your duties require? Do you supervise and manage the game management program for the Mescalero Reservation?

A. Yes, I assist the conservation officer in making all surveys and game counts as far as the wildlife and I am responsible for protecting the grazing of the Mescalero Apache Tribe.

Q. What is the purpose of these surveys and studies?

A. To determine number and age and sex of our game animals on the Reservation.

Q. What is the basic purpose of having this knowledge?

A. We conduct these surveys to determine how many animals there are actually on the Reservation. And this correlates with our recommendations that we make to the Tribe as far as bag limits are concerned.

Q. Do these surveys also tell you what the terrain will support?

A. Yes.

Q. You take a survey to determine how many are there and how much more can be supported or how may need to be taken off of it, is that correct?

A. Yes, sir.

Q. And then you make these recommendations to the Tribe?

A. Yes. In conjunction with the conservation officer.

Q. Why, for example in the Tribe situation this year you allow, and have for several years, both a buck and a doe during that particular hunting season for deer, whereas the State only permits buck primarily throughout the State?

A. This is to prevent an overly amount of doe to accumulate and to keep our buck-doe ratios in the correct percentage.

Q. If they get out of balance, what happens?

A. Oh, if the buck-doe ratio gets out of balance, then you have many more doe than you do buck. Then, of course, your reproduction of your fawns is affected to the fact that there aren't enough buck to service the does. And if you do allow the doe to increase over the years, you have an over-population of your deer in general, and this begins to re-create problems.

Q. Does the Mescalero Tribe, then, with your assistance and the assistance of the conservation officer, try to keep a balance here as to what their land will support?

A. Yes.

Q. By keeping this buck-doe ratio at a certain level?

A. Yes. This is the basis for our aerial helicopter count and ground surveys is our whole point. It's based on conservation.

Q. Well, the amount that are recommended to be taken out in a particular deer season, is that also related to your conservation?

A. Why, yes.

Q. For purposes of conserving the hunting and fishing industry?

A. Yes.

Q. All right, sir, are there other uses for this land other than just for game?

A. Yes. The Reservation supports approximately 6,000 head of Hereford cattle.

Q. Is there any determination made as to who many cattle are going to be kept, as to how many deer are going to be allowed to remain or elk are going to be allowed to remain on the Reservation?

A. Yes. There has been surveys done as to the amount of elk and deer that can be run in correlation with our cattle herd.

Q. Do you have a standard of measurement for that?

A. We base our measurement on animal unit months.

Q. What is an animal unit month in regard to cattle?

A. It's the amount of force consumed by a cow in a period of one month.

Q. Like one cow?

A. Yes.

Q. What is the unit in terms of, say, deer or elk?

A. You correlate, you would say that there are approximately six deer equal to one animal unit.

Q. How about elk?

A. Elk, approximately two elk.

Q. In other words, if we eliminated six deer, we could put one more cow in, is that correct?

A. Yes.

Q. If we got rid of two elk, we could put another cow unit on, is that correct?

A. Yes.

Q. How is the supply in terms of horses?

A. This is the big problem on the Reservation right now. We presently have approximately 2400 head of horses on the Reservation. These are Farro horses and they are competing directly with the cattle herd on the Reservation and are located primarily in the same areas that our cattle herd is. The Tribe presently has a contract with—

Q. What is a Farro horse?

A. This is essential a wild horse, but not in the true sense of the word Mustang. It is a horse that is running free and unclaimed.

Q. In terms of the horses that are removed then, more game or more stock, cattle, could be placed on?

A. Correct.

Q. On the Reservation, is that correct?

A. Yes.

Q. Are you familiar with the movement and transfer and release of elk on the Mescalero Reservation in the past?

A. Yes.

Q. Do you have any information by reason of your particular activities with the Tribe as to what the Mescalero Reservation could support in terms of elk, say, in 1964?

A. Approximately 400 head.

Q. How many elk are on that Reservation today?

A. We estimate approximately 1200.

Q. What was the support aspect, from 400 in '64, what has caused the change to enable 1200 to be on the Reservation today?

A. Since that time, we have had a considerable amount of range development on the Reservation creating areas which in the past, in 1964 were unable to support cattle due to unavailability of water. Since that time, many wells have been placed in areas allowing cattle to utilize these areas and bringing the cattle away from the direct competition with the elk in our higher country. In fact, we have, this in fact has created more actual grazing area for the cattle.

Q. If you didn't have elk in the higher country, you couldn't move cattle back up into there then? Is that correct, if the elk were gone, could you replace them with cows?

A. Correct.

Q. Can you tell us why August 29th was the selected date for the commencement of the antelope season on the Mescalero Reservation?

A. Yes. This was to prevent having our conservation officers split between our antelope season and our bear season, and which I believe the bear season begins on September 5th or 6th. And this would, since these two seasons are staggered, this will create a situation where we can have full coverage by all of our conservation officers on each of these hunts.

Q. How many days have been set aside from the antelope hunt commencing August 29th?

A. I believe there are four days.

Q. Four days. And did the State Game and Fish Department contact you or your office at any time in regards to trying to establish common dates in terms of State proclamation as opposed to the Mescalero proclamation?

A. No, they did not.

Q. Did you make any attempt to contact them in the same manner?

A. No.

Q. Why is the period of, whether it's August 29 or September 1st, why is this the best time for setting a hunting date for antelope?

A. The antelope by this time have gotten out of their running season. We have completed all of our counts as to the antelope, and generally, they are just ready to hunt by that time.

Q. When was this antelope season established? When were the dates picked?

A. This, I believe, was around the middle of March.

Q. The middle of March?

A. Yes.

MR. BLOOM: I pass the witness.

CROSS-EXAMINATION

BY MR. DUNIGAN:

Q. Mr. Blazer, how long have you been involved in game management?

A. I have been working for the Bureau of Indian Affairs for approximately one and a half years.

Q. Do you have a degree in wildlife management?

A. No, I have a Degree in range management.

Q. Your duties with the BIA, though, include not only range management concerns but game management as well?

A. Yes.

Q. What technique is used to survey elk, deer, and antelope in your work?

A. Our elk, deer, and antelope, on all three of these animals, we use aerial surveys to get a correct ratio of both sex and age of the animals. And the aerial surveys primarily are used also in counting actual numbers of elk and antelope. On our deer, we have what we call a deer density index, which we run these, they are samples that detect seasonal changes and actual deer trend numbers from year to year. These are taken twice a year.

Q. Are these techniques such as would permit an accurate estimate of the total population of elk and deer?

A. Yes.

Q. You mentioned, Mr. Blazer, that the number of cattle on the Reservation and the number of horses on the Reservation are of necessity taken into account by yourself and the Tribal conservation officer in arriving at a recommendation to make to the Tribal Council concerning bag limits and season dates for the various wildlife, is that correct?

A. Yes.

Q. And that the higher the number of game that are taken the more the Reservation can accommodate, more horses or more cattle, is that right?

A. More cattle.

Q. Are you aware of any study presently being conducted or contemplated to abolish the wildlife program entirely on the Mescalero Reservation?

A. Could you repeat that?

Q. Are you aware of any study presently being conducted or contemplated to do away with the wildlife program on the Reservation entirely?

A. No, I am not.

Q. But if there was such a program, you are not involved in it?

A. If there is such a program?

MR. BLOOM: He already said he didn't know, Your Honor. He can't be involved in something he doesn't know.

Q. (By Mr. Dunigan) If there were such a program being conducted now, would you be involved in it, do you think?

MR. BLOOM: I object. I think this is calling for pure speculation.

THE COURT: It's the same question.

MR. DUNIGAN: I have no further questions.

THE COURT: Rebuttal?

REDIRECT EXAMINATION

BY MR. BLOOM:

Q. Mr. Blazer, how long have you lived on the Reservation?

A. Except for the period of time from the age of nine months until three years, approximately two years, and for a period of three years when I was attending college in Los Cruces, I have lived there all my life.

Q. You have lived on the Reservation all your life. All right, are you a member of the Mescalero Apache Tribe?

A. Yes.

MR. BLOOM: No further questions.

THE COURT: You may step down.

MR. BLOOM: Your Honor, we would call Mr. Robert Thompson.

ROBERT THOMPSON

was called as a witness herein by the Plaintiff, and after having been duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. BLOOM:

Q. Would you state your name for the record, please, sir?

A. Robert R. Thompson.

Q. By whom are you employed?

A. The Mescalero Apache Tribe.

Q. in what capacity?

A. As a director of enforcement services. I direct the police force and the conservation program.

Q. As the director in that capacity, do you have anything to do with the enforcement of the Mescalero game and fish regulations on the Reservation?

A. Yes, sir.

Q. And what part do you play in that regard?

A. We direct the conservation officers and I have been employed in this capacity since last November. We patrol the areas in which hunts are being conducted to see that hunters are conforming with the regulations specified by the Tribe.

Q. Now, is there some method or manner that is in effect for identifying game after it has been taken on the Reservation?

A. Yes, sir. We require that the Mescalero Apache Game Tag be attached to the animal.

Q. Where do these game tags come from?

A. They are supplied with our Tribal license. They are attached just like the tags are on the State Game License.

Q. They are in fact a part of the license then, are they not?

A. That is correct.

Q. And are there game tags for each of the types of game that are to be hunted as their particular season comes up, for deer, bear, elk, antelope?

A. Yes, sir. And on the regular deer licenses where there are two deer, there's both a buck and a doe tag.

Q. The State of New Mexico would have no problems in terms of ascertaining that this animal was taken from the Reservation after it had left the Reservation if that tag was attached then, would it?

A. That is correct.

Q. Mr. Thompson, you have been on the Reservation more than just this last year and a half that you stated that you have been in this present capacity, have you not?

A. That is correct.

Q. How long actually were you, or have you been on the Reservation?

A. I was formerly employed as a criminal investigator for the Bureau of Indian Affairs for 20 years. During that time, I was employed at Mescalero from 1959 to 1967. I subsequently have been back almost every year during the hunting season to assist them with their enforcement on the Reservation.

Q. Over the number of years of experience, in addition to the last year and a half since you returned to the Reservation, do you know what the State's activities have been in regard to

aiding, assisting, supervising, or anything else in regard to hunting or fishing or anything else on the Mescalero Reservation?

A. Many years ago when I first went to Mescalero, and I was one of them that helped to get the hunting program started at Mescalero for non-Indians, we endeavored in every way to cooperate with the State. And in fact, it was our suggestion or my suggestion at that time that we require a State hunting license before we would issue a Tribal license. There has been some good cooperation with the State, various officers, Mr. Owens and I have known each other personally for 20 years. Charlie Byrd and I have known each other for a long time. We have had some sorry experiences with some of the State game people. A man named Cockrell arrested a Mescalero Apache Indian leaving Eagle Creek to bring a deer back to Mescalero. There is no other way to get to the Reservation residence area from Eagle Creek except to leave the Reservation through Ruidoso and back into the Reservation. Cockrell arrested the man. The animal was impounded, the man was fined, and the money was never recovered, nor the deer. During the year I was at Mescalero, Owens used to occasionally drop through Silver Canyon and down lower Elk Road to assist in spotlighters and so forth and control of them. But this was prior to our adopting the program that we have now where we have seven conservation officers on the Reservation full time. Some of these people work at night. We have got more than a hundred radio-equipped cars patrolling that Reservation during the day and part of the night. We are not asking the State to come in and assist us now, but at one time there was cooperation to an extent.

Q. That was some 15 years ago then, was it not?

A. That is correct.

MR. BLOOM: Pass the witness, Your Honor.

THE COURT: Mr. Dunigan?

CROSS-EXAMINATION

BY MR. DUNIGAN:

Q. Mr. Thompson, are you a member of the Mescalero Apache Tribe?

A. I am not.

Q. You are not an Indian?

A. I am not.

Q. Mr. Thompson, do you and your subordinates enforce the Mescalero Apache Tribal ordinances or regulations pertaining to hunting and fishing on the Reservation against non-Indians?

A. We do. After this year, the Tribal ordinance allows for us to cite people to the Tribal Court. We haven't started doing this yet.

Q. There has never been a case in your experience in which that has been done?

A. At Mescalero?

A. Yes.

A. Not at Mescalero. But there have been numbers of cases in the night circuit and in the State of Arizona where people have been cited to tribal court.

Q. To whom do you have reference?

A. Pardon?

Q. You are using the term "people have been cited"?

A. Non-Indians. There is a night circuit court opinion on this that has been—

Q. Let me ask you, Mr. Thompson, in your experience on the Mescalero Reservation in the past at least the Tribal ordinances and regulations have not been enforced against non-Indians?

A. Not against non-Indians. We have cited people to magistrate's court in the past. However, Mr. Jordan, the attorney for the Defendant, recently has asked for a dismissal and got it based on the fact the magistrate had no authority or jurisdiction over non-Indians arrested on the Mescalero Apache Indian Reservation except on traffic citations.

Q. Is it your experience, or have you been instructed for the 1977 season to attempt to enforce the Tribal ordinances and regulations pertaining to hunting and fishing against non-Indians on the Reservation?

A. The proclamation states it will be enforced. I haven't been instructed to do that personally, but the proclamation does say so.

Q. Against non-Indians?

A. That is correct.

Q. And does the proclamation provide for fines to be levied whether Indian or non-Indian?

A. That is correct.

Q. Is it your intention as the chief or director of the conservation police force to personally and through instruction to your subordinates to enforce these ordinances against non-Indians?

A. If I am instructed to enforce these ordinances, I will enforce them, and we will have a Tenth Circuit opinion in addition to that other one, one way or another.

Q. But you have not been so instructed to date?

A. As of this date, no.

MR. DUNIGAN: Thank you. No further questions, Your Honor.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. BLOOM:

Q. Mr. Thompson, you have enforced Mescalero regulations in the past, have you not?

A. That is correct.

Q. What court did you cite them?

A. Depending on the nationality of the person involved, an Indian went to Tribal Court; a non-Indian went to a State magistrate, or in some cases, we cite them to the Federal magistrate for Federal, U. S.

Q. Pursuant to 18 U.S.C., 1165?

A. 65, yes, sir.

Q. You use a standard United States violation citation for that, do you not, for non-Indians or Indians?

A. In the past we signed complaints before either the U. S. Commisioner or now the U. S. Magistrate. However, recently we do have citation books which are a penalty assessment type, and they are mailed to Denver.

Q. These are a Federal citation?

A. That is correct.

Q. I hand you what has been marked as Plaintiff's Exhibit 17 and ask if you can identify that, sir?

A. This is a copy of a violation notice to the United States District Court.

Q. These citations can and are issued for violations of Tribal ordinances, are they not, on regulations in hunting and fishing areas?

A. They could be issued for a violation of a Tribal ordinance, if that ordinance, if it goes to Federal court, now it's a penalty assessment, but if the Tribal ordinance conforms with this, yes.

MR. BLOOM: I move for the introduction of Plaintiff's Exhibit 17.

THE COURT: Any objection?

MR. DUNIGAN: No objection.

THE COURT: It will be admitted. (Plaintiff's Exhibit 17 was admitted into evidence.)

MR. BLOOM: I have no further questions.

THE COURT: You may step down.

MR. BLOOM: The Plaintiff will rest at this time, Your Honor.

THE COURT: Mr. Dunigan, do you have testimony?

MR. DUNIGAN: We will call Mr. William S. Huey.

WILLIAM S. HUEY

was called as a witness herein by the Defendant, and after having been duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. DUNIGAN:

Q. Will you state your name and address, please?

A. William S. Huey, Santa Fe, New Mexico.

Q. What is your occupation, Mr. Huey?

TRANSCRIPT OF PROCEEDINGS

April 25, 1978

(Trial on merits)

MYRA ELLEN JENKINS,

was called as a witness herein by the Defendants, and after having been duly sworn, testified upon her oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. DUNIGAN:

Q. Would you state your name and address, please?

A. Myra Ellen Jenkins, 1022 Don Cubero, Santa Fe.

Q. What is your occupation, Mrs. Jenkins?

A. I'm Chief of the Historical Services Division of the State Records Center, and hence, in charge of the official archives of New Mexico. I am also State Historian.

Q. Would you outline, for the Court, your educational background and professional training?

THE COURT: I don't believe it's necessary to, unless Mr. Fettinger wishes to hear it.

MR. FETTINGER: No, sir.

THE COURT: I think the qualifications are recognized.

MR. DUNIGAN: All right, sir.

Q. (By Mr. Dunigan) You serve, in short, as State Historian, do you not, Dr. Jenkins?

A. Yes.

Q. Dr. Jenkins, the Court is taking Judicial Notice of the fact that the Mescalero Indian bands were present in the area of

the Mescalero Apache Reservation for a period prior to the Treaty between the Tribe and the United States, entered into on July 1 of 1852. Would you describe for the Court what was the character and/or the style of the Indian occupation of this territory at this time, at the time of the Treaty of 1852, and prior to that?

A. You're speaking of the Apache?

Q. Yes.

A. Yes sir. The Apaches, there were large numbers of them in New Mexico of various groups, generally known as the Eastern or the Western Apache. The Eastern Apache, by the time of the U. S. occupation consisted of the Mescalero, and generally, all of the bands associated with the Eastern Apache, and their range was considered to be Eastern Rio Grande, and were generally considered by one generic name as Mescalero. The Western Apache had various designations, mostly by the the specific alliances which they live by. The Mescalero are generally known by the name of the leaders of the band. They were bands of Indians with an acknowledged chieftain, and they obviously, certainly acted in concert, in alliance together, but there was no one framework of Tribal Government, as we know it today, at that time, for the Apaches.

Q. There were small bands of Apaches which ranged over a large area of the Southwest, including New Mexico, and other states?

A. This is true certainly of the Mescaleros of Eastern Texas, and, of course, down into Mexico and New Mexico; the Western Apache in New Mexico, Arizona, largely.

Q. Now, the Mescalero Apache, as I understand your testimony, is east of the Rio Grande?

A. Yes, sir. This is generally considered to be what anthropologists or historians call the range of the Mescaleros, and generally boundaried roughly on the north by the Sierra Blanca, and on the east by the Pecos River.

Q. Would it have included a much larger area than what is presently the Mescalero Reservation?

A. Oh, yes, indeed, sir.

Q. Did the Mescalero Apache want, at that time, to establish any settlements or communities in New Mexico?

A. Actual settlements or communities, no, there were certain places where the individual bands, traditional places, where, for periods of time, they had encampments. There had been a few attempts by the Mexican authorities and the Spanish authorities to get the various Comanches to establish a village form, and the like, but this was not their way of life.

Q. Would you describe their system of social and political organization?

A. Sir, I'm not sure that I'm competent to do so. That's more of an anthropologist's position. Historically, as I say, the documents, as they are, in many respects on the actual entries of the workings of the Apache bands' growth are rather silent. Historically, as I say, they seem to have operated in relatively small bands under the leadership of, I presume, a leader of their own choice; certainly, one who would have commanded their respect and they did follow him.

Q. And rather than establish settlements or communities, they would roam from time-to-time, seasons-to-seasons over a large area?

A. This is true.

Q. And this was the situation prevailing in 1852, the year of the Treaty with the United States?

A. Yes, sir, that was the situation.

Q. For the purposes of your testimony in this case, Dr. Jenkins, have you examined the Treaty of 1852 between the Mescalero and the United States?

A. Yes, sir.

Q. What was the situation in the territory of New Mexico, with regard to the relationship between the United States and the Indians at the time of the signing of that Treaty?

A. Sir, it was extremely tense between the; well, not perhaps between the United States Government. Certainly, it was extremely tense between the non-Indians who were in the

area and the Indians because of all of the Tribes, that is, all but the Pueblos, because after U. S. occupation, and finally, the signing of the Treaty of Guadalupe Hidalgo, and the California Gold Rush, and the flocking of non-Indians in the territory, the discovery of mines; well, in the southwestern part of New Mexico, this created a situation of extreme tenseness. There were a great many confrontations, because certainly, the Apache, not only the Mescalero, but even more so, the Western Apache felt themselves being obviously pushed out of their traditional areas, and out of their traditional pursuits by miners and gold-seekers and the United States Army, who was attempting to guard the main routes of trade, the Del Mar Route, the Stage Coach Routes, and other routes through New Mexico. It was a very tense and very serious situation.

Q. It was tense with a number of Tribes, not with just the Mescaleros?

A. That is true. It's tense with all, particularly, with all of the Apache Tribes after the Guadalupe Hidalgo.

Q. So, the United States sought to enter into treaties with these various Indian groups, Mescaleros and others, too?

A. Actually, sir, the person who really sought to enter into the Treaty, particularly in the 1852 and in the 1865 Treaties, was the Governor of New Mexico, the Territorial Governor. There was, at the time, of course, with New Mexico being a territory; there is a conflict still, between who really has the ultimate authority to settle.

The Governor was a part of the conflict with the Commanding Officer of the Military District in New Mexico, and this often complicated the situation both with respect to political affairs and particularly with respect to Indian control, because civil Governors, beginning with Calhoun who had to Return East because he wasn't well enough to carry out his mission, and followed by Greiner, as Acting Governor, until the arrival of William Carr, attempted for the most part, and were much more interested in trying to secure treaties of peace, and come to some sort of a notice of vendee with the Tribe, and where the military officials, of course, duty was to protect the

people, to keep the peace, and to try to protect the settlers and so on, and they were by no means complementary, I would say that by majority, the Civil Governors were the ones who attempted to make the peace treaties.

Q. The objective on the part of the Civil Governors was to strike a peaceful situation with the various Indian groups, who were in a hostile posture with the emerging settlements in the area?

MR. GOTTSCHALK: Your Honor, I would like to register an objection to Mr. Dunigan's leading of the witness. She's an expert, and I think she doesn't need to be led along to the appropriate conclusion. She's well able to answer a simple question.

THE COURT: I don't see any real problem with it, under the circumstances. Go ahead, Mr. Dunigan.

Q. (By Mr. Dunigan) Did you have an opportunity to answer that question?

A. I'm sorry, sir, you lost me. Would you repeat your question?

Q. Describe, then, in short, the purpose of the Treaty of July 1, 1852 between the United States and the Mescaleros.

A. Well, of all of the treaties, and particularly with the Mescalero, certainly it's to try to stop the killing, try to stop the conflict, and actually from some of the notations which went on in advance of the Treaty, part of it, certainly on the part of the civilian government, was actually in an attempt to protect the Indians from some of the outrages against them.

Q. Was the Treaty of July 1, 1852, patterned after any other treaties of that era?

A. Yes, sir. Mr. Greiner states, specifically, that in drawing up the Treaty, he had relied on the 1849 Treaty with the Navajo, and with the Utes, with the Mouache Utes.

Q. Were all of those prior treaties also for the purpose of bringing peace and friendship among the people in that area?

A. Yes, sir, they were for peace and friendship. Also, I might point out that all of the treaties, for one of their bases, was an attempt to return captives. They were all treaties of peace and friendship.

Q. Do you have a copy of the 1852 Treaty?

A. Yes, sir.

Q. I believe it's in evidence as Exhibit—

MR. FETTINGER: 24.

Q. (By Mr. Dunigan) —24.

A. I have several copies of the Treaty, do you want the printed one?

Q. Is that with reference to the Treaty of 1852, Article 2 thereof? Is that the significance of the recital in Article 2?

A. Of peace and friendship, yes. "From and after the signing of this Treaty, hostilities between the contracting parties shall forever cease, and perpetual peace and amity shall forever exist."

Q. Does the Treaty of July 1, 1852, grant to the Mescalero, any organizational or territorial status?

MR. GOTTSCHALK: Objection, Your Honor, I think that calls for a legal conclusion. I don't think she's been qualified as a legal expert in this field. We'll make the appropriate legal argument as to the effect of the language in the Treaty.

THE COURT: She may answer.

A. Would you repeat that, Mr. Dunigan, please?

Q. (By Mr. Dunigan) Does the Treaty of July 1, 1852, grant any organizational or territorial status to the Mescalero?

A. It doesn't grant any organizational status, I would say, no. It does state, however, that as soon as possible, the U. S. should designate, settle, and adjust territorial boundaries.

Q. Does it establish a Reservation?

A. No, sir.

Q. After this Treaty was signed, Dr. Jenkins, what followed from there? Was there any change in the pattern and practice of the Mescalero to roam the areas you've described?

A. No, sir, because there was nothing in the Treaty that would have prevented them, in any way, from staying in their traditional homelands.

Unfortunately, the situation did not materially improve. For one thing, Congress delayed some time in ratifying the Treaty, from the summer of 1852 until March. And in the meantime, there were incidents, again, on both sides; but certainly of confrontation and accusations against the Mescaleros for theft of stock, and accusations by the Mescaleros against the non-Indians for theft of stock, their stock, and so on.

Actually, however, again, the situation was much more tense with the Western Apache, whose land lay at fork really with the trade routes than it was with the Mescalero, and there continued to be confrontations. So that, William Carr and his successor, David Meriweather, again, Territorial Governors attempted again to get actual treaties. As a matter of fact, Carr signed with El Mimbrenos, and then came the six Treaties which Governor Meriweather negotiated in 1855. One was with the Mescaleros, with Cuentas Azules' name appearing on it.

Q. Before we get there, Dr. Jenkins, as I understand it, after the Treaty of 1852 was signed, the Mescalero neither voluntarily nor otherwise settled in one place in this area?

A. No, sir, there was no reason why they should. There was no implication that they had to.

Q. And no Reservation was set aside for them?

A. No, sir.

Q. Then, as I understand your testimony, during this period, hostility and friction continued, and there were deprivations of various kinds occurring on the part of the Mescaleros and non-Indians, both, in this area?

A. This is true. I would say in that situation, it was much more tense with the Western, but it was also true of the Mescalero, yes.

Q. So, the basic purpose of the 1852 Treaty, did not seem to be availing at that time?

A. That is true.

Q. Now, as I believe you've indicated, another Treaty was entered into by the Mescaleros and the United States, is that true, in 1855?

A. Yes, sir. It was never, however, ratified. It was entered into by David Meriweather in March, but not ratified.

A. Did you say it was not ratified?

A. No, sir.

Q. So, it never became operational?

A. No, sir. It was one of six that were signed that year.

A. What was the purpose of that Treaty?

A. The purpose of that Treaty was primarily a try on the part of Governor Meriweather, and very probably on the part of the military, too, that if there could be—actually Reservations would be designated, then, it would be a situation in which it could be much more easily controlled. In other words, could control the non-White aggressors, and certainly the Indians for purposes of pacification and so on. It would resolve the situation much more clearly.

A. The Treaty of 1855, then, which although signed was not ratified, did establish a Reservation for the Mescalero Apache Tribe?

A. Yes, sir, it did. A larger Reservation than would be in the case today.

Q. Did the proposed Reservation in that 1855 Treaty, if you know, include any parts of the present Mescalero Apache Reservation?

A. Mr. Dunigan, I have drawn a very amateurish map from that Treaty, and attempted to put the lines on a highway map, and it does include the southern portion of the present Mescalero Reservation, and it is—

MR. GOTTSCHALK: Your Honor, at this time, I would interpose an objection, based on relevancy. I don't feel the 1855, or any proposed treaty, has any relevancy to the laws, considering the fact that it was not ratified. We do have a Treaty that was ratified, and the Reservation that was established, and all of this material is irrelevant.

THE COURT: Fine, it will be utilized.

Q. (By Mr. Dunigan) Dr. Jenkins, although the proposed Treaty of 1855 set out a Reservation for the Mescaleros, were the Mescalero bands ever situated on the Reservation, as a community?

A. Well, they still, many of them, of the bands, were still—of course, this is right within their homelands, for example, Dog Canyon, and this is one of the traditional areas, and they continued, obviously, to inhabit the same general areas which they had before.

Q. But they were not settled there by the Government?

A. No, sir.

Q. Was a Reservation established for the Mescaleros in 1864 by Presidential Executive Order?

A. An Executive Order, in 1864, established the Bosque Redondo Reservation, which was to be for both the Navajo and Mescalero. There was no Treaty with them because they had no choice. It was either go or else becoming exterminated, according to the Army Commands.

Q. Is the Bosque Redondo located in the area where the Mescalero bands normally roamed?

A. Yes, some of them would have gone that far, probably would have roamed that far north, Montezumas, but that is, they certainly would have preyed for whatever purposes, and not particularly occupying the area, constantly.

Q. Why was this Reservation considered necessary?

A. It was considered necessary. In the intervening years, the Civil War had come into New Mexico, and, of course, with the removal of many of the Federal Officers, or many saw fit to

join the Confederacy, and had left New Mexico. And then, with the invasion of the Confederates from Texas, and finally, the rather successful conclusion of the Civil War, however, of course, resulted in the Armed Forces that had been established for Indian protection, and the Army Patrols, the Army for Indians, had to be totally redrawn because of the sectional difference as a result of which tempers really flared more, and there were many more Indian confrontations and difficulties.

And then, in the summer of 1862, James H. Carr arrived in New Mexico, the end of the sectional controversies with the California volunteers, and he very quickly replaced Kennedy, and turns his attention immediately to the so-called "Indian problem."

The two that he considered to be the most dangerous, were the Navajo and the Mescalero, and the Army forced on Indians. Carson, the head of New Mexico Militia, was ordered to round up the Mescalero and the Navajo, and place them on the Bosque Redondo Reservation. Many of the Tribes actually came in for protection because of the harassment of the Army, and in fear. Actually, however, there were troubles on the Reservation between the Navajos and the Mescaleros, and the land was quite horrible. The situation was almost impossible, and I think it was in November of 1865, the Mescalero decamped in the night.

Q. Had it been the intention, when this Reservation was established in 1864, that it would be the permanent home of the Mescalero bands?

A. Well, actually, I think it would probably be much more accurate to say that it was simply a way of military control of the Indians. Yes, there were supposed to be, land was to be farmed and seeds were to be furnished, and equipment was to be furnished. But obviously, the area was not large enough, nor fertile enough to provide for a Reservation, its military control.

Q. In any event, the Mescalero withdrew from the Reservation the following year?

A. They definitely, literally took off in the night, all but nine of them.

Q. And then, what did they resume doing at that time?

A. Well, they returned to their traditional areas. Cadette, who had replaced his father, Barranquito, goes east of the Sacramento, in East Texas, and the other bands had scattered into their known territories, and Dog Canyon. Others had scattered to their traditional homelands. However, about this time, about the end of the Civil War, and with the end of the sectional controversies, you had a great many more settlers, particularly in the Tularosa area, from the Rio Grande settlement, there being a serious flood, and whatnot, and the Indians actually surfaced, wanting to be Mescaleros, and, of course, were much more sinned against than being sinners. There were many more attacks on their herds, and people moving into their land than there were vice versa. But nevertheless, it was again a very serious confrontation, a very serious situation with the homes, with the settlers, of course, very interested in the lands, and the Indians obviously interested in attempting to carry on their way of life.

Q. Did these circumstances continue, then, until the Executive Order of 1873, which established the original boundaries of the present Mescalero Apache Reservation?

A. It continued until then, and actually, it continued even further. Until, well, probably consummating in the so called Disarmament Order by Colonel Patch in 1880, of the entire Mescalero Tribe, as I said, probably because the situation was complicated by not only, as I say, increased immigration, the fact that many of the Mescaleros did not stay, small groups of them did not stay on the Reservation, and by the fact that their ally, the Great Mimbreno Victorio, in 1879 and 1880 is in and out of the Mescalero Reservation. And whatever merits the charge and so on, many of the Mescaleros were given the blame by the military for some of the deprivations committed by Victorio, et cetera, and came the disarmament of the Mescaleros in 1880. Afterwards, things were relatively calm. Of course, this is nothing that is uncommon to one, it's a situation with most of the Reservations.

Q. How were the Mescalero bands located on the Reservation in 1873, was a military campaign waged to situate them there, or did they come voluntarily, or what was the situation?

A. Most of them came in voluntarily, as I said, because, for one thing, and they certainly offered them a great deal of protection than they had had otherwise, both from the military and from settlers and from bands which literally preyed on the Mescaleros. Many of them came in voluntarily. As a matter of fact, Cadette had always been at Bosque Redondo, and was very interested in bringing in his band, and one of the things that caused them to accept the situation, was the murder of Cadette at the Bosque in 1872, just before the Executive Order was created.

Q. Was the establishment of the 1873 Reservation, now, in your judgment, a necessary, inexorable result of the Treaty of 1852?

MR. GOTTSCHALK: Objection, Your Honor, that calls for a legal conclusion.

THE COURT: She may answer.

A. I don't think it has anything to do with the Treaty of 1852.

Q. (By Mr. Dunigan) The Executive Order of 1873 did no more than establish certain boundaries for a Reservation on which the Mescaleros were situated?

A. This is correct, it was modified several times after that.

Q. In other words, Doctor, in your judgment, the 1873 Reservation is not tantamount to a Treaty Reservation?

A. No, sir.

MR GOTTSCHALK: Objection, legal conclusion.

Q. (By Mr. Dunigan) And you mentioned, I believe, Doctor, that the boundaries of this Reservation have been changed from time-to-time since 1873?

A. Yes, it's been modified, I believe, the last time was 1887; several times.

Q. Doctor, does the Treaty of 1852, or the Executive Order of 1873, grant title to any lands to the Mescalero Apache Tribe?

MR. GOTTSCHALK: Objection, Your Honor, calls for a legal conclusion, again.

THE COURT: She may answer.

A. Certainly, the Treaty of 1852 does not. I'm not familiar with the Executive Order Reservation, or of the particular difference, but certainly, the 1852 Treaty does not.

Q. (By Mr. Dunigan) Does the Treaty of 1852, grant to the Mescalero Apache Tribe, exclusive hunting and fishing rights, or title to fish and wildlife on the Reservation?

A. It does not mention, sir,—

MR. GOTTSCHALK: Objection, Your Honor. First of all, it calls for a legal conclusion. Secondly, the Treaty is in evidence. The language will speak for itself, if it mentioned hunting and fishing, et cetera; if it doesn't, the legal argument will have to be made from the language that exhibit contains.

THE COURT: She may answer.

A. There is no such language in the Treaty, sir.

Q. (by Mr. Dunigan) Does the Treaty, or the Executive Order of 1873 mention anything about retained or aboriginal rights of any kind, on the part of the Mescalero Apache Tribe?

MR. GOTTSCHALK: Your Honor, in order to not keep interrupting, I would like to have a continuing objection to all questions relating to the questions of the Executive Order, and any interpretation thereof, so I would not have to continue to object.

THE COURT: You may.

MR. DUNIGAN: May the witness answer, Your Honor?

THE COURT: Yes.

A. Would you repeat the question?

Q. (By Mr. Dunigan) Does either the Treaty of 1852, or the Executive Order of 1873, mention anything about any retained or aboriginal title or rights of any kind, on the part of the Mescalero Apache Tribe, with reference to the Reservation?

A. There is no such language in the 1852 Treaty. The Executive Order, I do not have before me.

Q. Let me ask you this, Doctor, if you know, was it historically, was it the practice or intent or understanding of the parties to the Treaties entered into, at this time, that the Indians were to retain any aboriginal rights of any kind, by virtue of these Treaties?

MR. GOTTSCHALK: Same objection.

THE COURT: Go ahead.

A. I'm not quite sure I understand your question, Mr. Dunigan.

Q. (By Mr. Dunigan) Well, as a historical matter, was it customary for the Treaties of this period to confer upon the Indians any aboriginal rights or titles of any kind, and if so, would that be expressly stated in the Treaties?

A. I'm not sure about aboriginal titles, this is before Indian claims cases, and so on, but certainly, the Treaties, that's the Tapeguache Utes in 1863, and the Fort Sumner Reservation Treaty with the Navajos, do specify, and the 1855 unratified, that the Indians seek the title that they have to the general areas, in return for the reservationed right to the Reservations, and they specify, of course, not only the Reservation boundaries, but the terms and the Reservation itself.

Q. The Treaty of 1852 between the Mescaleros and the United States does not so specify?

A. No, sir.

Q. Historically, Dr. Jenkins, did the Treaties of that era confer upon the Indians any jurisdiction or authorities over non-Indians on the Reservation?

A. No, sir.

Q. Was the 1873 Reservation, as changed from time-to-time by subsequent Executive Orders, still in existence in 1912 when New Mexico became a State?

A. No, sir.

Q. Was the territory of the Reservation included among the lands granted to the State of New Mexico by the New Mexico Enabling Act?

MR. GOTTSCHALK: Objection, Your Honor, it's irrelevant and calls for a legal conclusion.

THE COURT: She may answer.

A. It is not so. The Reservation, none of the Reservations are excluded from that, to my knowledge.

Q. (By Mr. Dunigan) As a historical matter, Dr. Jenkins, if you can answer this, was the method of creating an exclusive Federal Indian enclave within a territory which was to become a State clearly established by 1912, for example?

A. Well, certainly, it had been established ever since the Reservation had been created, and, of course, the struggle for the State of New Mexico was a long and tortured one, and I doubt if that question had even arisen, but certainly, many other Reservations were created within territories which later became States. They were then considered certainly within that State's boundaries, politically. Specifically, that is from a geographical point of view.

Q. May I ask you this, if it had been the intention of the United States to exclude the Mescalero Apache Reservation granted to the State of New Mexico, how would that have been accomplished, if you know? Was there a procedure for that, that was clearly established at the time of the entry of New Mexico into statehood?

A. Sir, I don't know, I don't. I, certainly, have no knowledge in that area.

MR. DUNIGAN: Fine. No further questions.

THE COURT: Mr. Gottschalk.

CROSS-EXAMINATION

BY MR. GOTTSCHALK:

Q. Dr. Jenkins, I want to avoid any legal questions, and so, I want to restrict my questions to historical facts, and ask you, whether as a historical fact, you are aware of any abrogation of the Treaty of July 1st, 1852, either by the President of the United States, or by Congress. By that, I do not mean—I realize you've testified there was further confrontation after the Treaty. Not after that, I mean, after, whether you know of any historical documents or statutes passed after that time, which abrogated the Treaty of July 1st, 1852?

A. No, sir, I do not.

Q. I gathered from your testimony, or inferred from it that Cuentas Azules with a Mescalero, is that correct?

A. Yes.

Q. And his name is one of those names appearing on the Treaty, is that correct?

A. His name is one of those names appearing on the Treaty, yes.

Q. And from your—excuse me, I'm sorry.

A. Yes.

Q. From your knowledge of the Indians of that time period, was Capitan Vuelta also a Mescalero?

A. Oh, yes, sir.

Q. And was Negrito also a Mescalero?

A. Well, there is a Negrito who was a Mescalero. There are several Western Apaches with the name of Negrito. There is a Negrito, yes.

Q. And at the time of the signing of the Treaty in 1852, there was considerable reference in correspondence between officials at the time that a Treaty was to be entered into with the Mescaleros, is that correct?

A. Oh, yes. The strange thing is that the four of the five who are signing, were not, are not mentioned on the Treaty. But, yes, there are four or five that Greiner says, specifically, signed their names, and do not appear on the Treaty, Negrito, Francisco, and a couple of the others.

Q. How about Mangas Coloradas, what Tribe did he belong to?

A. Mangas Coloradas is a Copper Mine Gila Apache, he's Western Apache.

Q. Is that a subgroup of the Chiricahua?

A. No, sir. As a matter of fact, it's probably pretty much the other way around. The Mimbrenos, or the Gila Apache, as I said, the bands in most of the area which they inhabited, most of them actually look to Mangas Coloradas, until after his killing, as the leader, although they, too, operated rather independently.

Q. How about Blancito, do you know what Tribe or affiliation he had?

A. I have no idea, sir, I have not come across him at all.

Q. Capitan Simon?

A. No.

Q. Would it be fair to say that the one place you might have some inkling as to what Tribe they belonged to, is the fact that their names appear on the Treaty, a contemporary document was stated to be entered into with the Mescaleros?

A. That is what the Treaty states, yes, sir.

Q. So that some of that evidence would at least indicate, however, inconclusively, that they might be Mescaleros, is that correct?

A. That's correct.

Q. If you know, could you tell me whether, in your opinion, in that time period, the Mescaleros tended to be fluent in English?

A. No, sir.

Q. Did they read or write?

A. Now, some, well, there may have been some that couldn't. Certainly, some obviously picked up some English, probably more of them actually spoke Spanish than did English.

Q. By and large it would be very unlikely that they could read the Treaty of July 1st, 1852?

A. That's right. They put their "X" on the Treaty, yes.

Q. I believe as I understood your testimony, that after the Treaty of July 1st, 1852, the Mescaleros continued to roam in the same aboriginal homelands that they had roamed in previous to the signing of the Treaty, is that correct?

A. I don't believe I used aboriginal, but the same historic range, yes, sir.

Q. They did, in fact, draw their subsistence from that area, they got their food from that area, they lived in that area?

A. Oh, yes, sir.

MR. GOTTSCHALK: May I have one second?

Q. (By Mr. Gottschalk) Just one last question. The present Reservation, as it is presently constituted, is in what you call their historical range, is that correct,—

A. Yes, sir.

Q. —and what I call their aboriginal home?

A. Yes, sir.

MR. GOTTSCHALK: Thank you.

THE COURT: Rebuttal?

MR. DUNIGAN: I have no further questions of this witness, Your Honor. I do have two exhibits which we would propose which are pertinent to her testimony. One being the Treaty with the Mescalero Apache Tribe of June 24th, 1855, which was executed, but not ratified. And an Executive Order of March 2nd, 1909, which I don't believe is included among

those which have been offered by the Plaintiff. And I would like to offer those at this time, Your Honor.

THE COURT: Any objection?

MR. GOTTSCHALK: Yes, Your Honor, we would object to both. Number one: the Treaty being offered was not ratified, and number two, the 1909 Executive Order has no relevancy to the lawsuit, because there was a subsequent Executive Order, which is in our list of exhibits, which in effect, made the 1909 Executive Order null and void.

THE COURT: They will be admitted. You may step down, Doctor.

Have you identified those, Mr. Dunigan?

MR. DUNIGAN: Yes, Your Honor. The State's Exhibit A would be the 1855 Treaty, and Exhibit B would be the 1909 Executive Order.

THE COURT: All right, sir.

MR. DUNIGAN: We call Mr. William S. Huey.

WILLIAM S. HUEY,

was called as a witness herein by the Defendants, and after having been duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. DUNIGAN:

Q. Would you state your full name and address for the record, please?

A. My name is William S. Huey, I live in Tesuque, New Mexico.

Q. Are you the same William S. Huey, who testified previously in this cause at the hearing held on the Plaintiff's Motion for Preliminary Injunction?

A. I am.

Q. Is your educational background, professional training, the same today as it was at that time?

A. That's correct.

Q. I believe one significant event that has occurred, however, in that regard, Mr. Huey, since the last hearing, is your appointment as Secretary of the Department of Natural Resources?

A. That's correct.

Q. By virtue of that, you are a member of the Governor's Cabinet of the State of New Mexico?

A. That's correct.

Q. The Department of Game and Fish, which you were formerly the Director of, is now a division under your jurisdiction?

A. The Department of Game and Fish is a Department which is administratively attached to the Department of Natural Resources.

Q. You're aware, are you not, Mr. Huey, that a stipulation has been entered into between the parties to this lawsuit, which specifies certain facts which have been agreed upon between the parties?

A. Yes.

Q. That stipulation, Mr. Huey, relates, in part, that in 1966, 1967, there was an importation of 162 elk, approximately, from Wyoming to the Mescalero Apache Reservation. The stipulation provides that the elk were donated to the Mescalero Apache Tribe by the National Park Services, and New Mexico issued a permit—the State of New Mexico issued a permit for the importation.

Q. Would you relate to the Court how and when this idea of the importation of elk came about? Was it an idea that originated in the mid-sixties, or was it a matter that the Department had been concerned about previous to that?

A. The files of the Department indicate discussions of the transplanting of elk, or the release of elk on the Mescalero

Apache Reservation as far back as 1932. There is correspondence between the U.S. Forest Service, and Elliott Barker, who was the Director of the Department at that time, correspondence between the Bureau of Indian Affairs, and one of the members of the State Legislature at that time. And I believe in 1957, there was correspondence between Homer Pickens, who was the Director of the Department at that time, and the U.S. Forest Service. The 1967 situation was not an original-type situation, something had been going on since 1932, discussions, at least.

Q. The idea of the implanting of elk on the Reservation was a matter of discussion since 1932, as far as you know?

A. Correct.

Q. Would you describe the Department of Game and Fish's position with reference to that matter, over these years?

A. The Department intended—

MR. FETTINGER: Your Honor, we appreciate the history lessons, but I fail to see the relevancy. In faith of the stipulation, the elk were brought in in the stipulated time period, and I fail to see the relevancy to this line of questioning.

THE COURT: Mr. Dunigan.

MR. DUNIGAN: I don't mean to dwell on this much longer at all. I just wanted the Court—

THE COURT: I think this is something Mr. Huey discussed earlier, if my recall is right, what the origin of the elk was, and the locality.

MR. DUNIGAN: Yes, sir. Well, maybe we could hasten things. We have prepared Exhibits C through O, which pertain to the history of the discussions concerning the implantation of these elk, and the objections of the Forest, National Forest Service, and the activities of the Department in support of the implantation, and we would propose to introduce those, hopefully, without having the witness identify each one, if Counsel would have no objection.

MR. FETTINGER: Your Honor, once again, our question is one of materiality of this lawsuit. Secondly, most of these items are objectionable on the basis of hearsay, and I fail to see where any of these letters would be kept in the regular course of business in the Department, with the exception of Exhibit M, which appears to be an importation permit. However, presuming that the Court would admit them without considering the fact that we are admitting to the truth of the facts alleged therein, if they're only for the purpose of saying that a dialogue went on about elk on the Mescalero Reservation, we'd be happy to stipulate to that fact, Your Honor.

MR. DUNIGAN: Your Honor, we would propose the exhibits and testimony would show not only that the discussions were carried on, but that the Department, indeed, assisted, cooperated with the Mescalero Apache Tribe in the location of the elk on the Reservation, and took an active part in accomplishing that objective, even though there was some opposition on the part of, at least, the National Forest Service.

THE COURT: Can you gentlemen enter into a stipulation to that effect?

MR. FETTINGER: Basically, yes, sir.

THE COURT: Fine. Why don't you do that. If there is any problem with it, we'll utilize the exhibits, if necessary.

MR. DUNIGAN: Are the exhibits to be admitted in case they are needed?

THE COURT: Yes.

MR. FETTINGER: Excuse me, sir, may I identify the exhibits that we're talking about? Is it Defendants' Exhibits C through O we're talking about?

MR. DUNIGAN: Yes, Your Honor.

THE COURT: Yes.

Q. (By Mr. Dunigan) To conclude this matter, Mr. Huey, would the implantation of the elk in '66 and '67 have been possible without the support and permission of the Department of Game and Fish in the State of New Mexico?

MR. FETTINGER: Your Honor, we'd object to the compound question, so far as the permit is concerned. It's a legal conclusion of the witness. In regard to the rest of the question, it's speculative, and calls for speculated answers on the part of the answering witness, without proper foundation being laid.

THE COURT: Fine. I'm going to let him answer.

A. At that time, there was an agreement between the Secretary of Interior, and the various states that had to do with the disposition of resident wildlife within the various states on Federal lands. In order for the elk to leave Wyoming, it was necessary that the State of Wyoming agree to removal of the elk from the lands of the National Park Service, and it was up to our Department to request that the State of Wyoming provide that agreement. We, of course, issued the importation permit.

Q. The permit of the State of New Mexico was essential to the whole business?

A. Yes.

Q. The stipulation to which reference has been made, Mr. Huey, specifies that the elk population in the Mescalero Reservation area is now 1,200, or approximately 1,200. In your professional judgment, is it possible that such a large herd of elk would remain within the Mescalero Reservation since the transplant of '66 and '67, at least, without physical constraint?

MR. FETTINGER: Your Honor, we'd suggest to the Court that this is within the scope of the stipulation, and refers to the fact that, upon occasion, the elk do leave the Reservation and return. I believe the stipulation covers this point, and it's only repetitive.

MR. DUNIGAN: May it please the Court, I don't believe the stipulation does cover this particular point, and that is why, short of agreement with the Plaintiff on that issue, we wanted some testimony to that effect.

THE COURT: Fine. He may answer.

Q. (By Mr. Dunigan) Do you recall the question?

A. I think so.

THE COURT: Do the elk migrate, Mr. Huey?

A. The elk are not restricted on the Reservation, and because they're not restricted, they would probably follow the patterns of their choice in their daily, weekly, and seasonal movement off of the Reservation and back onto the Reservation.

Q. (By Mr. Dunigan) What are the implications from a game and fish management conservation standpoint both as to the increasing size of the elk hered, and its free-ranging movement over this area?

A. Well, of course, the extent of the movement of the elk amplifies the effect that their presence has on the total ecosystem of that area.

Q. What is an ecosystem, and how would the elk in that area fit into that concept?

A. Okay, an ecosystem is a combination of biological units that interreact with each other. An ecosystem that included a herd of elk, would be a geographic area that contained the habitat components required by those elk on a year-to-year basis, food, cover, water, and, of course, that escosystem then would contain all of the other animals and plants that are not necessary to rely on each other, but interreacted with one another.

Q. In terms of the ecosystem concept, how would the other wildlife in this area, deer, the antelope, and the bear, and other wildlife fit into the ecosystem concept of management?

A. They would fit into it in respect to the effect that each individual of these groups or the groups as a whole impacted with the other groups. The deer and the elk are, in part competing for forage. I would imagine that there would be a very little relationship between the elk and the antelope, probably not too much relationship between the elk and deer and the bear except as they act as prey for the bear, the bear's predator-type position.

Q. What is that?

A. Almost all of the biological areas in the ecosystem relate to one another in one way or another. Some of these relations are pretty obscure, and others that are not obvious, might be very important.

Q. The Department, as I understand it, utilizes an ecosystem concept in its Wildlife Management Conservation Program.

A. I wouldn't say that we have perfected the ecosystem approach to management, but I would say that we're getting closer and closer each year.

Q. What are the implications of that system to the fish and wildlife on the Mescalero Apache Reservation?

A. The Reservation is a geographic area, not a biological area. There are no biological boundaries that are comparable to the geographic boundaries of the Reservation.

Q. Are you suggesting that because of the location and free-ranging habits of the wildlife in the area of the Mescalero Apache Reservation, that the physical boundaries of the Reservation, itself, do not comprise an ecosystem, or a management use?

A. That's correct.

Q. One other matter, with reference to the elk population, itself, Mr. Huey, I believe the Department has a regulation which limits or places a limitation on a single hunter, hunting elk for two consecutive years in the State of New Mexico, is that correct?

A. That's correct.

Q. Would you explain the reason for that limitation?

A. Well, the purpose of that regulation is to provide a more adequate distribution of hunter opportunity among the citizens, and the non-residents that choose to hunt in New Mexico. Since the hunting opportunities for elk are not great enough to accommodate everyone who wishes to hunt the area, and the year restrictions provide, as I say, better distribution of opportunity, without having to impose a more strict numerical limit on the number of persons who hunt each year.

Q. It's a matter of expanding the recreation opportunities made available?

A. Just distributing the opportunities more equally among the persons interested in hunting.

Q. Let me ask you this: How long has the Department of Game and Fish in the State of New Mexico been in business?

A. A long time. The first hunting regulations were in about 1895, territorial hunting regulations, and in effect, there has been a system of game and fish management activated in the State since that time.

Q. Apart from Indian lands in the State of New Mexico, which, as the stipulation provides, includes over 7.3 million acres, are there other private lands which the Department must be involved in in terms of fish and wildlife management?

A. Well, our program of fish and wildlife management is not developed with any consideration for status of ownership. There are a number of privately-owned areas in the State, where the question of entry has a bearing on the management practice, proprietary rights of the owner to identify control methods and frequency with which persons would enter that land for the purposes of hunting. But it's our, as I say, our plan of management of wildlife in the State, is on this ecosystem basis, and not with consideration of geographic boundaries.

Q. But your management concept, then, has to take into account activity everywhere, regardless of the status of the land?

A. That's correct, correct.

Q. What is the interest of the State of New Mexico, or the Department, in enforcing its hunting and fishing laws, with respect to activities on these private lands, including Indian lands?

A. I think—

MR. FETTINGER: Your Honor, I hate to interrupt, but this area was covered rather thoroughly in the stipulation, and we're repeating areas that we have covered once in the

stipulation. The purpose of the stipulation is to save the Court's time, and save the necessity of bringing witnesses before this Court.

MR. DUNIGAN: I understand that. I don't intend to take much more time with this witness, but there were certain items which we were unable to meet agreement on, with reference to the stipulation, and I thought it advisable to amplify in some small measure on the provisions in the stipulation with regard to the pattern of fish and wildlife management, and the needs and interests of the State in making operational its programs and policies.

THE COURT: Fine. Well, it's my understanding that the Department exercises control over all of the areas in the State, except on the Reservation, and on these privately-owned tracts of land that have their own management, and furnish their own game, maintain a fence. Probably not in the National Park areas, but certainly in the proving grounds, Elephant Butte Reservation, Navajo Reservation, all of the rest of them, with very few exceptions. This is my understanding of the situation. I may be wrong about it, but it's my recollection of it.

MR. DUNIGAN: I don't believe you are wrong.

Q. (By Mr. Dunigan) Is that your understanding, Mr. Huey?

A. That we take a position that we have jurisdiction over the management of wildlife in the whole State of New Mexico, that's the position of our Department.

Q. And that you do, in fact, exercise it with very few exceptions?

A. Yes, that's correct.

THE COURT: They even exercise management over the range of the Mesilla Valley, that are owned by the Elephant Butte District.

Q. (By Mr. Dunigan) Would you describe briefly, Mr. Huey, the potential effects, as you see it, of an inability on the

part of the Department to control or coordinate hunting and fishing activities within the State, on a State-wide basis?

MR. FETTINGER: Your Honor, we'd object to the question, requiring speculation on the part of the witness, unless there is a proper foundation laid with reference to how it interferes with the State's specific program.

THE COURT: Fine, he may respond.

A. If we can't continue to develop annual regulations and management plans that involve the whole State, then, we would have to attempt to estimate the effect that excluding portions of the State might have on the total management plan. In the absence of any research that relates itself to that question, it would be practically impossible at this time. It would also be difficult or impossible to maintain the contact with the hunters and fisherman who participate in the sports State-wide, for reports of their activities, which we use to define trends and hunter activity, and harvest, and the impact of this activity on the total resource.

Q. (By Mr. Dunigan) The licensing requirement for hunters and fisherman within New Mexico is a means of keeping track of who's doing what, in terms of hunting and fishing?

A. That's correct, in addition, of course, to the revenue that's derived from the sale of those licenses.

Q. Is that revenue utilized in, and needed for the carrying out of the Fish and Wildlife Management Program in the State of New Mexico?

A. That's correct.

Q. What other scientific methods are used by the Department in its management conservation program?

A. You know, if we began to describe all of the different techniques that we used, we would take a long time. I would say that the techniques and procedures that our Department uses in the management of fish and wildlife in the State, are those that have been either developed by our Department, or

developed by other Departments, and adopted as standard procedure for the management of fish and wildlife. They're becoming more and more complicated each year, there is more and more technology involved, and it's becoming, each year, much closer to a science than an art, than it used to be.

Q. Would you describe just briefly some of the research activities that are carried on by the Department, and what implications they have, if any, on the State-wide basis?

MR. FETTINGER: Your Honor, we fail to see the relevancy of this item, especially in light of this former Court's service as the Governor of the State, and I realize the plans are carried out by the Department, and they have so stated. I'm sure they do carry on research. The relevancy to the particular State seems so remote, it's beyond comprehension.

MR. DUNIGAN: Your Honor, the purpose of this testimony is to provide the Court with an adequate picture of the activities of the State, in reference to game and fish management, and the implications it has for activities on Indian land, and the importance of that activity to the Department's overall program, and also, to point out that the Department's program has a beneficial effect on all areas of the State, whether or not its jurisdiction there is recognized. And that's the purpose of this testimony. I don't intend, and don't want to belabor that point. If that's clear and understood and agreeable to everybody, then, I don't need to pursue this.

THE COURT: I think probably it would take about a day to go into all of them.

MR. DUNIGAN: I'm sorry, Your Honor.

THE COURT: I say, I think it would take a day to go into all of them, Mr. Dunigan.

Q. (By Mr. Dunigan) Mr. Huey, would you evaluate the Mescalero Apache Indians' Fish and Wildlife Management Program?

MR. FETTINGER: Your Honor, We're going to object to that. The stipulation covers the fact that the actions of the Tribe have had no adverse impact on fish and wildlife outside

of the Reservation, and it would be speculation on the part of this witness, because he's previously testified to a lack of information about what went on within the Reservation.

MR. DUNIGAN: Your Honor, I recognize the stipulation, which says that in the judgment of the Department, the ordinances of the Tribe presently maintain the wildlife at a management level, and that there have been no adverse effects on the Reservation. My question in this regard simply goes to the extent this witness is familiar with the system of management on the Reservation, and the other activities there, how they would be evaluated on a professional basis.

THE COURT: Fine. He may answer, if he can.

A. I would say that the management program, the Wildlife Management Program on the Reservation is not a program that the Department would use on lands over which it had exclusive control.

MR. FETTINGER: Objection, Your Honor, that's not responsive to the question.

Q. (By Mr. Dunigan) Could you elaborate a little more on that, in what specifics would it be inadequate, in your judgment?

A. With respect to the relationship that exists between wildlife and domestic livestock.

Q. I see. What are the specifics of that particular problem, as you see it?

A. The adverse competition between domestic livestock and wildlife.

Q. You've speaking of the competition between the wildlife and the livestock that reside on the Reservation?

A. Correct.

Q. Historically, Mr. Huey, has it been the policy and practice of the Department to accommodate the Mescalero Apache Tribe and other Indian groups in the State, with reference to their preference for seasons and bag limits and the like?

MR. FETTINGER: Your Honor, we'd object to the question as being compound, and in that regard, it applies to the other Indians in the State. It's irrelevant in regard to the Mescalero Apache Tribes, there is no appropriate foundation to demonstrate that the Tribe has requested such changes in seasons, and I believe the stipulation provides that the changes were prompted by two things; occasionally, the request of the Tribe, and also, at the Commission's request, on its own initiative.

MR. DUNIGAN: Your Honor, my purpose in this inquiry is to inform the Court that whether or not any particular request had been made, although I'm certainly getting into the specifics of that, the posture of our Department with reference to the diverse Indian groups within the State of New Mexico.

Let me, if I may, Your Honor, ask Mr. Huey whether he knows of any requests, at any time, on the part of the Mescalero Apache, for a preference with respect to hunting seasons or bag limits or the like.

A. Specific requests of the Mescalero for—

Q. (By. Mr. Dunigan) Has there ever been one, to your knowledge? Has the Mescalero Tribe ever expressed to the Department any preference with regard to hunting seasons or bag limits or the like, and sought to be, and asked the Department to cooperative with them in that regard?

A. There was, for quite a time, a general atmosphere of working together on these things. The only specific that I can remember is an occasion when the Commission changed the regulation, extended the deer season to accommodate a request of the Tribe.

MR. DUNIGAN: I don't believe I have any further questions, Your Honor.

THE COURT: Mr. Fettinger.

CROSS-EXAMINATION

BY MR. FETTINGER:

Q. Mr. Huey, I believe you stated, back in 1967, that there was some agreement with the Secretary of the Interior, which required cooperation of the State. My understanding of your testimony was to the effect that the Wyoming cooperation was required in order to remove the elk from that State, is that correct?

A. That's correct. If Wyoming hadn't agreed to the release of the elk, under that agreement, the Secretary of the Interior, the Park Service wouldn't have been able to remove the elk.

Q. And you believe the State of New Mexico was material in getting the State of Wyoming to act in that particular instance?

A. That's correct.

Q. B.I.A. didn't have anything to do with it?

A. I don't know that B.I.A. had any dialogue with the State of Wyoming. I do know that our Department had dialogue with the State of Wyoming.

Q. Do you know for a fact that the B.I.A. did not have dialogue with the State of Wyoming?

A. No.

Q. Do you know for a fact that the Mescalero Apache Tribe did not have dialogue with the State of Wyoming?

A. No. I do not.

Q. Then, the State of New Mexico was one of the participants in that particular episode, is that correct?

A. I would suggest that the position of the State of New Mexico, in a discussion of this kind, would be an important party to that discussion.

Q. That wouldn't be influenced by your present position, would it?

A. I'll let you know how the State operates.

Q. A moment ago you told us that the elk range on and off the Reservation, the Mescalero Reservation, in this case. Do you have any knowledge that would lead you to believe that all of the elk leave the Reservation?

A. No.

Q. What are the factors that determine whether or not the elk will leave a particular area, whether or not it's an Indian Reservation?

A. It may be a matter of choice and habit.

Q. That choice and habit include eating?

A. Yes.

Q. Would the presence of adequate food influence an elk to stay in its present location?

A. Not necessarily.

Q. Would it be one factor the animal would consider?

A. It would be one, that is correct. Correct.

Q. Would it be an important factor?

A. That's correct.

Q. Would it, the presence of water, be an important factor in the consideration of whether or not it would move, in fact, to another location?

A. It would be an important factor.

Q. Would the elevation of the Territory be an important factor as to whether or not the animal would seek another location for its home?

A. The elevation would contribute to seasonal movement.

Q. Do you remember, are there adequate changes in elevation available to suit the habits of elk and their seasonal movement within the confines of the Mescalero Indian Reservation?

A. I would certainly agree, if the Mescalero Reservation were completely enclosed, that a given number of elk could exist there, forever.

Q. My question was, in fact, are there adequate changes in elevation on the Mescalero Indian Reservation to accommodate elk in both the summer and winter months, for that latitude?

A. Only as far as the choice of the individual animals causing those needs to be made.

Q. Within your experience, would you anticipate that the elk could survive easily within the confines of the Mescalero Reservation during both the summer and winter months?

A. If they chose to do so.

Q. If they chose to do so, then the area is capable of supporting them?

A. Correct.

Q. Are you aware of the size of the elk herd when it was brought in in 1967?

A. Yes.

Q. Do you have any knowledge regarding the present size of the elk herd on the Mescalero Reservation?

A. I don't have any specific knowledge of the size of the elk herd, no.

Q. Presume for the moment that it's 1,200. After a period of 11 years, would that indicate reasonably good game management in regard to the elk?

A. Well, I wouldn't agree that anything other than protection would be necessary to cause an increase of that kind. I wouldn't agree that any management at all would be necessary.

Q. One of the aims of your Department, in issuing a limited number of licenses, is the protection of game animals in the State of New Mexico?

A. Of course, the reason for issuing licenses is to provide consumptive recreation benefits. Limiting the licenses would be protective, yes.

Q. Limiting licenses by the State of New Mexico is an effort to protect the number of game animals within the State of New Mexico and control the numbers, is that correct?

A. One of the methods.

Q. Would the same rule apply to the Mescalero Reservation?

A. Yes.

Q. You mentioned before that you have reason to believe certain of the elk may have left the Reservation. May I ask if you know of any adverse impact upon the game program of the State of New Mexico, by virtue of the elk leaving the Mescalero Indian Reservation?

A. Not to this point, no, I think there is a potential, though, for a problem.

Q. Would there also be a potential for problems ranging for the same circumstances across the common State boundary with the State of Arizona?

A. Well, there is one situation where problems of that kind might exist between New Mexico and Arizona.

Q. How about Colorado?

A. Same.

Q. The same principle applies, doesn't it, if they were to go on a program to exterminate their game, it would have an impact on our game animals in New Mexico?

A. That's correct.

Q. If they went on a program for no game hunting, that would have an impact on our animals, wouldn't it?

A. I don't think that would be an adverse impact.

Q. But it would have an impact?

A. Right.

Q. It would have an influence on your management decision in influencing the herds in New Mexico?

A. That's correct.

Q. Can you think of any specific requests of the Mescalero Apache Tribe, addressed to the Fish and Game Department, with regard to the Management on the Mescalero Reservation, in your field?

A. As I said before, I can remember that one case where the Tribe did ask that the seasons be changed. There is correspondence in the files that we've reviewed just recently, having to do with previous plans to plant elk on the Reservation, which were requests made for assistance. Requests were made for assistance in about 1969, for the Department to conduct a wildlife enforcement training course on the Reservation.

Q. For whom?

A. I wouldn't say it was a rare situation.

Q. Not quite rare? Not quite rare?

A. It was not rare.

Q. It happened a couple of times?

A. It happened more than a couple of times, that, I think, happened a number of times.

Q. That training program you've talking about was for conservation officers of the Mescalero Apache Tribe?

A. Yes.

Q. And that program was successfully conducted by the State of New Mexico?

A. Yes.

Q. Members of the Tribe attended?

A. Yes.

Q. To your knowledge, those members went back to serve as conservation officers within the confines of the Mescalero Indian Reservation?

A. I don't have any idea how long they might have served, but I would assume that they served for some time.

Q. Are you familiar with the 3,200-acre game preserves in the State of New Mexico?

A. Yes.

Q. What do you call those?

A. Class "A" Parks.

Q. Does that have any impact on your game management?

A. No.

Q. It doesn't? Are those fenced areas?

A. Yes.

Q. Are they fencing out some animals as well as fencing in some animals?

A. Yes.

Q. Limit the area where an animal can feed?

A. Well, they limit the area in which an animal might feed. They don't necessarily limit the ability of the animal to feed.

Q. But they do limit the animals, on each side of the fence, and the areas they can roam and feed and find water?

A. Sure.

Q. May I ask you what your management of a specially big game species, based upon a herd concept, means?

A. Well, that's an attempt to narrow the parameters that you'd work in when you're developing hunting regulations, season dates, bag limits, habitat improvements, because the demand of the different herds would probably be different. In other words, it would provide a higher level of sophisticated management, when you break it down on the herd basis.

Q. What's the difference between a herd concept and your ecosystem?

A. The herd concept would be comparable to the ecosystem concept, except that it wouldn't take into consideration the other species that are interreacting with the species that you're talking about managing.

Q. When did your Department launch itself on the ecosystem concept, if I may ask?

A. Well, it's not a function of launching, like you just get up in the morning and go out and talk ecosystem, it's just another area of sophistication. The comprehensive plan that our Department has developed over the past three years gives heavy emphasis to the ecosystem concept, to permit us to broaden our consideration of wildlife management to include the non-game, as well as the game species.

Q. And I note with interest, when we were here before, last August, you did not mention the ecosystem concept in your testimony at any time before the Court. Was it in effect at that time?

A. I only responded to questions as best as I could.

Q. Do you recall using the language, "Our management of the specially big game species is based upon a herd concept"?

A. You bet.

Q. And what's the herd concept you talked about before?

A. And it's still in effect.

Q. By the way, you were talking about elk leaving the Reservation. Could that, in any way, damage the management program of the State of New Mexico?

A. Well, it would depend on how many of them left.

Q. Well, 50 or 60, this might have some impact? What would be the impact of 50 elk leaving the Reservation, staying in the mountains, in territories otherwise frequented by hunters, and within your conventional jurisdiction?

A. Okay, we can identify two effects, and let's not limit it to 50, because, you know, as a matter of reality, we're not talking about 50, we're talking about the possibility of the herd continuing to grow so that there would be competition, adverse competition between the deer and elk, or the elk and some other species. The other impact, of course, would be to provide some recreation off of the Reservation.

Q. And the recreation that would be provided off of the Reservation would be hunting to hunters by the State of New Mexico for off-Reservation hunting, is that correct?

A. That's correct.

Q. And that would be done without expense to the State of New Mexico, is that correct?

A. Well, it would depend upon the degree upon which the competition factor between the elk and the deer became a problem. If the competition between the deer and the elk became significant enough that the deer herd was reduced, then the units of hunter opportunity would be reduced, because, quite obviously, an area can accommodate enough deer to provide more of a hunting opportunity, more hunter days, than that same unit could produce with an elk herd.

Q. Are we endangering saturating Southeastern New Mexico with deer at this time?

A. Not today or tomorrow, but I would say there is a danger of an excessive number of elk developing in that area.

Q. Remote danger?

A. Well, I can say it's remote in that the Department's management activities will be directed at attempting to prevent that from happening.

Q. Your activities are also aimed at preventing extinction of the animal in that area, is that correct?

A. That's correct.

Q. The Mescalero Indian Reservation has managed its game over the last eight or ten years. I believe our stipulation

recites that. You know of no adverse impact upon the wildlife off of the Reservation in that area, is that a fair statement?

A. That's correct.

Q. If the Mescalero Indian Reservation were to continue to manage its game in a reasonable way, as it has done in the past, would you anticipate any significant impact on the surrounding areas in regard to the items within your jurisdiction and control?

A. Well, you know, I don't—I think we're assuming, when we say "in a reasonable way," I don't know what a reasonable way might be.

Q. The way they've done it in the past eight years.

A. If they do it the way they've done it in the past eight years, it might result in some problems.

Q. Let's talk about this business of limiting the elk permits to every other year. I understand your purpose there is to permit a greater opportunity for hunters to hunt elk in New Mexico, is that correct?

A. That's correct.

Q. And it doesn't have anything to do with game management, does it?

A. No, it does not.

Q. It's a matter of public relations on the part of your Department?

A. No, it's not a matter of public relations, it's a matter of statutory responsibility.

Q. To satisfy the greatest number of hunters, then?

A. Yes.

Q. Are there any restrictions on hunting antelopes in New Mexico?

A. Yes.

Q. What are they?

A. They may be only hunted during open seasons, namely, only hunted, you know, there are specified methods and manners of taking their bag limits set each year.

Q. Any limitation similar to the one on elk, that you can only have one every couple of years?

A. That's correct.

Q. Is there any area that conflicts with the Mescalero Apache Tribe?

A. That's correct. Well, if the Mescalero Apache Reservation, or Mescalero Apache regulations don't include that, they'd be in conflict with our regulations.

Q. Yours contain those, to the best of your knowledge, and theirs do not, and they presently conflict, is that correct?

A. Yes.

Q. Can you authorize a hunter to go into a restricted military area?

A. Yes.

Q. What if that area is closed to the public?

A. Quite frequently, in deer hunting season, often the White Sands, and the San Andres, Oregons, the Magregor Range, the seasons, the entry of deer hunters is permitted when public entry is not permitted.

Q. But that's within the control of the military, isn't it,—

A. That's correct.

Q. —not within the control of your Department?

A. No, that's right.

Q. Are there other areas over which you do have the right to authorize ingress or egress?

A. We don't have the right to authorize that over any privately-owned lands.

Q. But in effect, you can open them up to hunting, is that correct?

A. That's correct.

Q. But you can't control the access of a hunter to White Sands Missile Range, for example, that's within the control of the military, while you may have the right to—

A. A function of the agreement between the military and the Game and Fish Department.

Q. And that's an agreement that could be changed at some particular time, perhaps, by the military, is that correct?

A. Well, those agreements are developed on an annual basis.

Q. Then, the military could change this?

A. But the military, the Department of Defense's Regulations, and the Sikes Act, a Federal Act that provides guidelines for the recreational use of military areas and others.

Q. They are like your Reservation Regulations, they can be changed, is that correct?

A. Well, of course, anything, I suppose, can be changed.

Q. In fact, you do not have control over the access to that area, the military does?

A. As a matter of practice, I think the access is more of function of the language in the Sikes Act, and these cooperative agreements, which we've developed with the military, and, you know, to say that they could be changed, is certainly true, but we're talking about practice.

Q. Practice is history?

A. That's right, it's history, and it's also pattern for the future.

Q. In a sense that history repeats itself?

A. Yes.

Q. Are you aware of how much land within Otero County is owned by some Governmental Agency?

A. No, I don't.

Q. Are you aware that it's substantial?

A. It's substantial.

Q. So, a substantial part of Otero County is not within your control for purposes of controlling access to and from the area, for purposes of hunting?

A. Well, wait just a minute, this is another subject that has been discussed. There has been quite a bit of dailogue with regard to areas of public lands being opened or closed to hunters, and I think it's pretty generally agreed that hunters cannot be excluded from other areas unless all other persons are excluded.

Q. Are all other persons excluded from other portions of the White Sands Missile Range, to your knowledge?

A. Yes.

Q. Therefore, hunters could be excluded from substantial portions of the White Sands Missile Range, is that correct, under your interpretation?

A. Well, I'll repeat myself.

Q. Excuse me, if you will just answer my question, please.

A. Could you repeat the question?

Q. You just gave me a theory, I'm applying it to the fact that if all persons are excluded from substantial portions for the White Sands Missile Range, then, hunters could be excluded from substantial portions of the White Sands Missile Range, under the standards you just gave me a moment ago?

A. Yes.

Q. Have you ever made inquiry of the Mescalero Apache Tribe regarding statistics covering hunting and fishing on the Reservation?

A. I have not.

Q. Would you consider the gathering of such statistics important to your program, as Director of the State Program?

A. Yes.

Q. No request has ever been made of the Tribe, or the B.I.A., for any such figures, though?

A. I'm not sure.

Q. Well, to your knowledge, have there ever been any such inquiries?

A. No.

Q. Have you ever made such inquiries of Fish and Wildlife?

A. No. There has been discussion between our Department and the representative of the United States Fish and Wildlife Service, as well as representatives of the Bureau of Indian Affairs, that have to do with the hunting activities, the number of hunters, the take by Indian hunters, and, you know, a general discussion of wildlife conditions on the Reservation, and annual harvest on the Reservation. As far as any formal request of the Tribe or the B.I.A., or the Fish and Wildlife Service for a written document of that, I don't think it's ever been done. I think that the level of hunting on the Reservation, as far as we know and have determined from this dialogue, that's existed between the representatives of the Department of Game and Fish, and the Fish and Wildlife Service, and the B.I.A., and the Tribe, have given us assurances that, you know, nothing was being done there that required any drastic change.

Q. You know of no reason to be concerned?

A. Well, of course, you're always concerned.

Q. Besides your normal concern for the general game population of the State of New Mexico, and the hunters, on the other hand, you know of no specific reason why you should be concerned about the hunting programs or the fishing programs on the Mescalero Reservation?

A. Not to this time.

Q. And in spite of the fact that the collection of statistics from hunters is a fairly expensive program of your Department, no request has been made of the B.I.A., or the Bureau of Sport Fisheries, or the Mescalero Apache Tribe, regarding the success

of Indian hunters, or other hunters on the Mescalero Indian Reservation?

A. Well, of course, the non-Indian hunters on the Reservation are covered by our surveys.

Q. Then, limit my question to the Indian hunters on the Reservation.

A. As I say, we considered it to be more or less a constant, and the numbers taken are insignificant enough to not be cause for, you know, the need for any change.

Q. Well, the numbers on the whole?

A. The adjustment.

Q. The numbers of all hunting on the Reservation is rather insignificant, isn't it?

A. That's correct, at this time.

Q. At this time, you maintain contact with your hunters by sending out questionnaries. To what percentage do you send questionnaries?

A. Ten percent.

Q. What percent respond?

A. Well, ten percent of the big game hunters, and about, well, some of the bird hunters, the percentage is higher than that. And the elk hunters, some of the elk-hunter surveys are 75 percent or greater. The antelope-hunter surveys are 100 percent.

Q. I'm sorry, go ahead.

A. The spans from those, I'd say, varies around 50 percent.

Q. You get back about 50 percent of the questionnaires you send out?

A. That's correct.

Q. You mentioned a number of research programs that were conducted by your Department. Were any of those

research programs conducted specifically for the Mescalero Indian Reservation?

A. No, I wouldn't say that any of the research projects were conducted for any specific geographic locality in the State. The purpose of the research project is species oriented, rather than oriented to geographic or individual user groups.

Q. But, in fact, none were prepared specifically for the Mescalero Indian Reservation?

A. That's correct.

Q. Were any specifically prepared for the B.I.A. in connection with the Mescalero Indian Reservation?

A. No.

Q. You referred to the adverse competition between wildlife and livestock for feed. Does that competition exist on the Mescalero Indian Reservation, to your knowledge?

A. Yes.

Q. Are you aware the Tribe runs a herd of cattle, and they have 6,000, 7,000 head on the Reservation?

A. I'm not aware of the exact number each year, but I was aware that a significant number of cattle are present on the Reservation every year.

Q. Are you aware that the Mescalero Apache Tribe sells hunting permits for elk, for example?

A. Yes.

Q. Are you aware that they charge rather substantial fees for those elk permits?

A. Yes.

Q. In your experience, if the hunting were not better within the area for which the person buying the permit—

A. Well, better than what?

Q. Better than anyplace else that's immediately available to him, the surrounding portion of the State of New Mexico.

A. Well, I know that hunters are willing to pay a substantial fee for elk hunting, and the quality of hunting that exists in the areas upon which they hunt, varies. I'm sure that if a person is paying as much as $2,000 to $3,000 for the privilege to hunt elk, that he's going to expect to have a pretty high level of success.

Q. To your knowledge, do the hunters hunting elk on the Mescalero Reservation have a high level of success?

A. High level of success.

Q. Is that a product of poor game management?

A. That's a product of a low number of hunters in comparison to the number of elk present.

Q. Do you know of a comparable success rate in any place in the vicinity of the Mescalero Reservation?

A. Here again, when we're talking about vicinity of the success ratio in the Vermejo Park, or the Jicarilla Reservation?

Q. Let's say 25 miles from the Mescalero Reservation.

A. No.

Q. 50 miles from the Reservation?

A. No.

Q. 100 miles away from the Reservation?

A. Bingo.

Q. That's where you get the Jicarilla?

A. No, that's where you get the Black Range.

Q. That's more or less private hunting?

A. That's correct.

Q. Do the Mescalero Reservations compare favorably with a private hunting preserve?

A. That's correct.

Q. Does that private hunting preserve have good game management?

A. No.

Q. Does it accomplish its purpose?

A. I don't know what their purposes are.

Q. To provide hunting for hunters, apparently, with a high success ratio.

A. Well, if that purpose is the major purpose, yes, it does occur. But if it's, you know, if they have a long-term objective of continuing to provide that kind of hunting, they're in trouble.

Q. You have no reason to believe that problem exists on the Reservations, from your observations of the past performance, do you?

A. Not at this time.

Q. From your observation of past performance?

A. Not at this time.

Q. Okay. Are you familiar with the fact that your attorney refused to enter into a stipulation regarding your familiarity with the game management on the Reservation, prior, in this lawsuit?

A. No.

Q. Where did you get your information regarding the game management program on the Mescalero Reservation?

A. Well, you know, as I know, I've been associated with the Department for quite a number of years, and for the past 15 years, very closely associated with the total game management program of the State. And in that position, I attempted, and I think I was successful, in keeping myself familiar with the conditions that exist in all parts of the State.

Q. Do you have any specific knowledge of the numbers of hunters, and the number of animals taken on the Mescalero Indian Reservation?

A. Not specific numbers, no.

THE COURT: How much more do you have, Mr. Fettinger?

MR. FETTINGER: One more question, sir.

Q. (By Mr. Fettinger) Have you ever had occasion to enforce your statutes regarding an Indian, who is not a resident on a particular Reservation, hunting on that Reservation?

A. No. Well, at least not—you know, not in—

Q. Not in the memory of man?

A. Not in the memory of this man.

MR. FETTINGER: Thank you, sir. No further questions, Your Honor.

THE COURT: Mr. Dunigan.

REDIRECT EXAMINATION

BY MR. DUNIGAN:

Q. Mr. Secretary, with reference to the areas over which you can authorize access, whether military or otherwise, the Department does license those who are admitted, and given access to those areas, does it not?

A. That's correct.

Q. So, you are aware of the activities that do take place on those lands?

A. That's correct.

Q. Now, with reference to research projects, you've indicated that your research normally doesn't—is not directed to benefit a particular area, necessarily. Let me ask you if any of the research projects that are carried on by the Department, do have a beneficial effect, at least, indirectly, throughout the State of New Mexico?

A. It's possible with any research project to expand the results of that project to other areas that are comparable, other

areas of habitat that are comparable, when we're talking about research projects that have to do with wildlife species.

Q. So, although research projects may not have been undertaken on the Reservation, or specifically with reference to the Reservation of the Mescalero Apache, nevertheless, that area may very likely benefit from the research that is conducted by the Department?

A. That's correct.

MR. DUNIGAN: Your Honor, I don't have any further questions. . . .

IN THE

United States District Court

FOR THE DISTRICT OF NEW MEXICO

No. 77-395-M Civil

MESCALERO APACHE TRIBE,
Plaintiff,

v.

STATE OF NEW MEXICO and
WILLIAM S. HUEY, Individually
and as Director of the New
Mexico Department of Game
and Fish, or his Successors in Office,
Defendants.

ADDENDUM
(filed August 4, 1978)

Having cited in the Memorandum Opinion entered herein the case of *United States v. Finch,* 548 F.2d 822 (9th Cir. 1977), it is noted that the judgment in *Finch* was vacated on other grounds, 433 U.S. 676 (1977). The comment quoted and the rationale of that opinion are nonetheless pertinent to the case presently decided.

/s/

UNITED STATES DISTRICT JUDGE

IN THE

Supreme Court of the United States

No. 80-778

NEW MEXICO, *et al.*,

Petitioners,

v.

MESCALERO APACHE TRIBE

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Tenth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of *Montana* v. *United States*, 450 U.S. ___ (1981).

IT IS FURTHER ORDERED that the petitioners, New Mexico, *et al.*, recover from Mescalero Apache Tribe Two Hundred Dollars ($200.00) for their costs herein expended.

April 6, 1981

Clerk's costs: $200.00